74-1656

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term,

No. _____

JOHN C. MOE, Individually and in his official capacity as Sheriff in and for the County of Missoula, Montana, et al.

Appellants,

vs.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

THE STATE OF MONTANA, et al,

Appellants,

vs.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

On Appeal from the United States District Court
for the District of Montana

JURISDICTIONAL STATEMENT

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INDEX

Page

Table of Authorities iii

Opinions Below 3

Jurisdiction 3

Constitutional Treaty and Statutory Provisions Involved 4

Statement of the Case 5

The Questions Presented are Substantial

1. The immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States. 8

2. The immunity from state taxation granted to Indians on the Flathead Reservation is contrary to the provisions of the General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349, and related legislation. 11

3. The District Court erred in holding it had jurisdiction to enjoin enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C. § 1341 12

Conclusion 13

Certificate of Mailing 15

Appendix 17

TABLE OF AUTHORITIES

CASES: **Page**

Allee v. Medrano, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974) 4

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) 10

American Commuters Association, Inc. v. Levitt, 405 F.2d 1148 (2nd Cir. 1969) 13

Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1952) 11

Bland v. McHann, 463 F.2d 21, (5th Cir. 1972), cert den. 410 U.S. 966 (1973) 13

Bolling v. Sharpe, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954) 9, 10

Boyd v. Nebraska, 143 U.S. 135, 12 S.Ct. 375, 36 L.Ed. 103 (1892) 9

Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1954) 10

Brown v. Chote, 411 U.S. 452, 93 S.Ct. 1732, 36 L.Ed.2d 420 (1973) 4

Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972) ..10

Carter v. Stanton, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972) 4

Confederated Tribes v. Namen, 380 F.Supp. 349 (D. Mont. 1974) 12

DeFunis v. Odegaard, 94 S.Ct. 1704 (1974).....10
Dickson v. Luck Land Co., 242 U.S. 371, 37 S.Ct. 167, 61 L.Ed. 371 (1917).....11
Diffenderfer v. Central Baptist Church of Miami, Florida, Inc., 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972).....4
Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622 (1934).....12
Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed. 583 (1973).....9
Gloss v. Board of Education, 373 U.S. 683, 83 S.Ct. 1405 10 L.Ed.2d 632 (1963).....10
Goudy v. Meath, 203 U.S. 146, 27 S.Ct. 48, 41 L.Ed. 130 (1906).....11
Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971)9
Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817 18 L.Ed.2d 1010 (1967).....9
Martin v. Mancari, 94 S.Ct. 2474 (1974) 11
McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed. 129 (1973) 9, 12
Mescalaro Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed. 115 (1973) 9, 12
Oklahoma Tax Commission v. United States, 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943).....12
Security State Bank v. Pierre, 162 Mont. 298, 511 P.2d. 325 (1973).....9
Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948) 11
Stevens v. C.I.R., 452 F.2d 741 (9th Cir. 1971) 12
United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 (1938).....9
Walters v. City of St. Louis, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954).....10
Worchester v. Georgia, 6 Pet. 515, 8 L.Ed. 483 (1832).....11

CONSTITUTIONAL PROVISIONS: **Page**

Article I, Sec. 8, Clause 3, United States Constitution..4, 9
Fifth Amendment, United States Constitution ...4, 5, 8, 10
Fourteenth Amendment, United States Constitution 4, 5, 8, 10
Fifteenth Amendment, United States Constitution 4, 9

TREATY: **Page**

Treaty of Hell Gate, 12 Stat. 975.....4, 5

UNITED STATES STATUTES: **Page**

Act of April 23, 1904, 33 Stat. 302.....5
Act of June 2, 1924, 43 Stat. 253 .....4, 9
Civil Rights Act of 1870, 42 U.S.C. 1981 12
General Allotment Act, 25 U.S.C. § 349, 24 Stat. 390 .....4, 5, 11, 12
Indian Reorganization Act of 1934, 48 Stat. 984 12
28 U.S.C. 1253 4
28 U.S.C. 1341.....4, 5, 12, 13
28 U.S.C. 1343 .....3, 13
28 U.S.C. 1362 3
28 U.S.C. 2201 3
28 U.S.C. 2281 3
28 U.S.C. 2284 3
42 U.S.C. 1983 3

MONTANA STATUTES: **Page**

R.C.M. 1947, Sec. 53-114.....4
R.C.M. 1947, Sec. 53-114(3) 8
R.C.M. 1947, Sec. 53-119.....8
R.C.M. 1947, Sec. 53-1025 to -1029.....4
R.C.M. 1947, Sec. 82-5606 to -5606.31 4

R.C.M. 1947, Sec. 84-201 4
R.C.M. 1947, Sec. 84-301 and -302 4
R.C.M. 1947, Sec. 84-404 4
R.C.M. 1947, Sec. 84-406 5
R.C.M. 1947, Sec. 84-409 and -410 5
R.C.M. 1947, Sec. 84-4201 and -4202 5

IN THE SUPREME COURT
OF THE UNITED STATES

October Term,

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No. _____

JOHN C. MOE, Individually and in his official capacity as Sheriff in and for the County of Missoula, Montana, et al.

Appellants,

vs.

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Appellees.

THE STATE OF MONTANA, et al,

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vs.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

— — — — — — — — — — —

On Appeal from the United States District Court
for the District of Montana

Jurisdictional Statement

Appellants appeal from the judgments of the United States District Court for the District of Montana, sitting as a statutory three judge court, declaring certain cigarette and personal property tax statutes of the State of Montana to be unconstitutional and enjoining their enforcement against Appellees. This statement is presented pursuant to United States Supreme Court Rules 13(2) and 15 to show that this Court has jurisdiction and that substantial questions are presented.

Opinions Below

The opinions of the District Court are unreported. Final orders and opinions, with Judge Smith dissenting in part, were entered in the cigarette tax case (Civil No. 2145) and in the property tax case (Civil No. 74-40-M) on February 3, 1975, and March 19, 1975, respectively. Earlier opinions were entered in the cigarette tax case on October 10, 1973 and May 10, 1974. The opinions of the District Court are reprinted and attached as parts of the Appendix to this Jurisdictional Statement.

Jurisdiction

The actions were instituted by Plaintiffs pursuant to 28 U.S.C. §§ 1343(3), 1362, 2201 and 2281 and 42 U.S.C. § 1983 seeking to have certain cigarette and personal property tax statutes of the State of Montana declared unconstitutional and to enjoin enforcement of such statutes against Appellees. In each case a three judge court was convened to hear the cause as provided by 28 U.S.C. § 2284.

On March 19, 1975 the three judge court, by divided vote, made and filed final Judgments (1) declaring the Montana

cigarette excise tax and the cigarette dealers' license tax invalid and enjoining the State of Montana from imposing the tax on sales of cigarettes by members of the Tribes to Indians residing on the Flathead Reservation and from requiring the cigarette dealers' license of members of the Tribes who sold cigarettes on the Reservation, and (2) declaring that the personal property tax statutes of the State of Montana were invalid and enjoining the State of Montana from collecting personal property taxes from members of the Tribes residing on the Flathead Reservation. Notices of appeal were filed by the Defendants in the United States District Court for the District of Montana on May 6 and 15, 1975.

Jurisdiction to review the Judgments of the District Court is conferred upon the United States Supreme Court by 28 U.S.C. § 1253.

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the Judgments on direct appeal:
Diffenderfer v. Central Baptist Church of Miami, Florida, Inc., 404 U.S. 412, 92 S. Ct. 574, 30 L.Ed.2d 567 (1972); *Carter v. Stanton*, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972); *Brown v. Chote*, 411 U.S. 452, 93 S.Ct. 1732, 36 L.Ed. 2d 420 (1973); and *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974).

Constitutional, Treaty and Statutory Provisions Involved

The constitutional, treaty and statutory provisions involved in this case are: Fifth Amendment to the Constitution of the United States; Fourteenth Amendment to the Constitution of the United States, Fifteenth Amendment to the Constitution of the United States; Article I, Sec. 8, Clause 3 of the Constitution of the United States; Treaty of Hell Gate, 12 Stat. 975; The General Allotment Act, 25 U.S.C. § 349, 24 Stat. 390; Act of June 2, 1924, 43 Stat. 253; 28 U.S.C. § 1341; R.C.M. 1947, §§ 82-5606, to -5606.31, R.C.M. 1947, §§ 53-114, 53-1025 to -1029, 84-201, 84-301 and -302, 84-404,

84-406, 84-409 and -410 and 84-4201 and -4202. The texts of these constitutional provisions, treaties and statutes are reprinted in the Appendix to this Jurisdictional Statement.

Questions Presented

The questions presented by this appeal are:

1. Whether the immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States.
2. Whether the immunity from state taxation granted to Indians on the Flathead Reservation is contrary to provisions of the General Allotment Act (24 Stat. 390, 25 U.S.C. § 349) and related legislation.
3. Whether the District Court erred in holding it had jurisdiction to enjoin the enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C. § 1341.

Statement of the Case

The Flathead Reservation, created by the Treaty of Hell Gate in 1855 (12 Stat. 975) consists of approximately 1,245,000 acres located in northwestern Montana. In 1904 Congress provided for allotments in severalty to members of the Tribes "under the provisions of the allotment laws of the United States." Act of April 23, 1904, 33 Stat. 302. Surplus unallotted lands within the Reservation were surveyed and appraised and opened for settlement under the homestead laws. As a result, over 404,000 acres were sold to non-Indians. Some of the lands alloted to individual Indians passed into non-Indian ownerships. The State of Montana received over 60,000 acres for school purposes. Additional

acreages were passed to churches and schools and others. At present approximately 628,642 acres are owned in fee and 614,311 acres are held in trust either for the Tribes or for individual Indians. The Reservation lies in parts of four Montana counties — Lake, Sanders, Missoula and Flathead.

As a result of congressional action, the Flathead Irrigation Project was created on the Reservation. Irrigation districts were established under state law and through use of the state courts of the State of Montana to operate and maintain the project and to repay the United States for construction costs of the project. An elaborate irrigation system has been built and extensive domestic power projects established to provide power for pumping and domestic and commercial use on Indian and non-Indian lands on the Reservation.

The Reservation is a well developed agricultural area with farms, ranches and communities located throughout the inhabited portions of the Reservation. Indians and non-Indians are randomly scattered over the whole of the occupied portions of the Reservation and live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.

Only about 19 per cent of the total Reservation population of approximately 17,826 is Indian. Enrolled members in the Tribes number approximately 5,749. Less than 3,000 members reside on the Reservation. Over 2,000 live outside the State of Montana. Over 4,000 of the tribal members have less than one-half Indian blood. Only 166 individuals are classified as full blood Indians. In many families residing on the Reservation only one of the parents is a member of the Tribes and only a part of the children are tribal members or are eligible for tribal membership.

As Montana citizens members of the Tribes are eligible to vote and do vote in city, county and state elections. Some hold elective and appointive offices. All services provided by the state and local governments are equally available to Indians and non-Indians including welfare benefits from the State of Montana, aid to dependent children, social and rehabilitation services, sanitary sewage and solid waste

facilities and public water systems. Access to the courts of the State of Montana is available to tribal members.

The only schools on the Reservation are those operated by school districts of the State of Montana. Indian and non-Indian children attend school at various free public schools throughout the Reservation. Approximately 27 per cent of all students in attendance at public schools are members of the Tribes. In some school districts tribal members account for a majority of the total student body. Approximately 91 per cent of the support for the schools is generated by state and local tax revenues.

The state and local governments have built and maintained a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction.

The Montana cigarette tax is 12 cents on each package sold within the state. 4.5 cents of the tax is allocated by state law to the state's general fund. The general fund is used for the support of state government, including the state institutions and the state educational systems, all of which provide service to Indians and non-Indians alike. Portions of cigarette tax revenues have been used by the State of Montana to pay veterans' bonuses. Eligible tribal members have received such bonuses. The cigarette tax loss to the State of Montana resulting from the sale of cigarettes on the Flathead Reservation for the years 1972, 1973 and the first half of 1974 exceeded the sum of $591,000.00.

Land held by the United States in trust for the Tribes was leased with tribal council approval by individual tribal members for the erection of "smoke shops." The council approved the purchase of cigarettes for resale by the tribal members and charged an administrative fee for the service. The individual member who established the smoke shops did not have a State of Montana license to sell cigarettes and the cigarettes which were sold did not have state tax stamps affixed. The Tribes and the individual Plaintiffs instituted the cigarette tax case after arrest of the operators by county officials for failure to have a cigarette dealers' license and for failure to have Montana cigarette tax stamps affixed to each package of cigarettes sold.

Personal property, including motor vehicles and mobile homes, owned by tribal members generated tax revenues to the State of Montana and its political subdivisions during the fiscal year ending June 30, 1974, of $111,159.01. Of this total sum $100,478.69 was expended by the counties, school districts, cities, towns and special taxing districts to carry out governmental purposes on the local level.

Under Montana law motor vehicles are required to be registered before being permitted on the public streets and highways of the state. R.C.M. 1947, Sec. 53-119. An owner of the vehicle is required to pay personal property taxes on the vehicle as a condition precedent to registration of the vehicle and receipt of license plates. R.C.M. 1947, Sec. 53-114(3). The personal property tax case was instituted by the Plaintiff Tribes and individual tribal members owning motor vehicles to enjoin the collection of personal property taxes.

The Questions Presented Are Substantial

The substantial questions raised by this appeal require plenary consideration by this Court. Each question is discussed separately below:

1. The immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States.

This issue presents four square to this Court as a matter of first impression the question of how fundamental principles of due process and equal protection are interwoven into the complex fabric of the interrelationships among the state, Indian tribes within the borders of the state, tribal member Indian citizens, non-tribal member Indian citizens and non-Indian citizens. The judgments of the District Court create a special exemption from state taxation for certain individual citizens of the State of Montana wholly because those citizens are Indians. This treatment of the Indian differently

from the non-Indian citizen is repugnant to fundamental principles of due process and equal protection. *Security State Bank v. Pierre,* 162 Mont. 298, 511 P.2d 325 (1973).

Since the Act of June 2, 1924, 43 Stat. 253, any doubt as to the United States and state citizenship of Indians has ceased to exist. See also *Boyd v. Nebraska,* 143 U.S. 135, 12 S.Ct. 375, 36 L.Ed. 103 (1892). Indians have and are entitled to all of the rights of citizenship including the right to vote accorded under Amendment Fifteen to the Constitution of the United States. In the instant case the facts demonstrate an unfetered exercise of all rights of citizenship by tribal members on the Flathead Reservation as part of an amalgamated and integrated society.

The power of Congress under Art. I, Sec. 3, Cl. 8 of the United States Constitution to regulate commerce with Indian Tribes affords no justifiable basis for perpetuation of distinctions which are in reality ethnic and racial in character. Nor do the pronouncements of this Court in *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) and *Mescalaro Apache Tribe v. Jones,* 411 U.S. 145, 93 S.C. 1267, 36 L.Ed.2d 115 (1973, dictate or even support such a conclusion. The issue raised here is not covered by those cases.

The reaches of congressional power in dealing with Indian Tribes are subject to constitutional limitations. *United States v. Klamath and Moadoc Tribes,* 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219 (1938). All actions of Congress in dealing with Indians are subject to the same limiting constitutional principles. Cf. *Kills Crow v. United States,* 451 F.2d 323 (8th Cir. 1971).

The exemption claimed here is an exemption founded solely upon considerations of race. *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), *Kills Crow v. United States, supra, Security State Bank v. Pierre, supra.* This Court has long adhered to the view that classifications based on race are contrary to our traditions and are constitutionally suspect. *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), *Loving v. Virginia, supra,* and *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Such classifications when created by the

United States, as distinct from those created by states, are no less suspect. *Bolling v. Sharpe, supra.*

While the Fourteenth Amendment does not per se apply to the federal government, its concept of equal protection applies to the United States through the due process clause of the Fifth Amendment. *Bolling v. Sharpe, supra,* and *Bulluck v. Washington,* 468 F.2d 1096 (D.C. Cir. 1972). The requirement of equal protection has been applied frequently in tax classification cases. *Allied Stores of Ohio, Inc., v. Bowers,* 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959) and *Walters v. City of St. Louis,* 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954).

The State of Montana obviously could not, consistent with Fourteenth Amendment concepts of equal protection, enact legislation which would discriminate as a class against Blacks or Mexican Americans. *Loving v. Virginia, supra.* Nor could Congress enact legislation directing the State of Montana to exempt all Blacks or Mexican Americans from state taxation without violating the equal protection concept embraced in the Fifth Amendment. *Bolling v. Sharpe, supra,* and *Frontiero v. Richardson, supra.*

Since *Brown v. Board of Education* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1954) this Court has repeatedly and consistently struck down and condemned laws which were founded on racial distinctions. See e.g. *Gloss v. Board of Education,* 373 U.S. 683, 83 S.Ct. 1405, 10 L.Ed.2d 632 (1963), *Loving v. Virginia, supra,* and *DeFunis v. Odegaard,* 94 S.Ct. 1704, (1974), Douglas J., Dissenting. The position taken by the District Court flies directly in the face of the policy enunciated in those cases.

Montana is forced by the decision of the District Court to participate in a program of invidious discrimination by treating its non-Indian citizens differently from its Indian citizens. *DeFunis v. Odegaard, supra,* presented the same problem in a different factual context. The issue here, however, is not moot, and will not pass with time. It can only intensify unless resolved by this Court.

The State of Montana is obliged to provide all state services to its Indian citizens and to extend to its Indian citizens all benefits of citizenship while imposing upon non-Indian

citizens the additional burden of taxation to supply services to Indians. No individual or group has the right under the Constitution to demand action by the state which results in the denial of equal protection of the law to other individuals. *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), and *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1952).

It begs the question to say that Indians have historically been treated differently from non-Indians. That rationale, starting with *Worchester v. Georgia,* 6 Pet. 515, 8 L.Ed. 483 (1832), arose out of another age and another time. Indians, like many other minority groups were not then citizens and were not members of society in the usual sense. That situation no longer prevails. Enlightened constitutional concepts demand a boldly different approach which obliterates racial distinctions.

Martin v. Mancari, 94 S.Ct. 2474 (1974) is not in conflict with the position asserted here. That case involved the Indian in relationship to the federal government, not in relationship to the state. The opinion is carefully limited to the problem of preferential employment in the Bureau of Indian Affairs — a problem related to Indian self-government.

2. The immunity from state taxation granted to Indians on the Flathead Reservation is contrary to the provisions of the General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349, and related legislation.

Some Indians residing on the Flathead Reservation own land in fee issued to them under the General Allotment Act, 24 Stat, 390, 25 U.S.C. 349. This Act was intended as a method of extending citizenship of the United States in each respective state to individual tribal members. Upon termination of the trust period provided for in the Act, the land was conveyed to the Indian in fee and at that time the allottee "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory" in which he resided. The individual tribal member became subject to the jurisdiction of the state. *Dickson v. Luck Land Co.,* 242 U.S. 371, 37 S.Ct. 167, 61 L.Ed. 371 (1917) and *Goudy v. Meath,* 203 U.S. 146, 27 S.Ct. 48, 41 L.Ed. 130 (1906). The allotment system in the General Allotment Act was specifically ap-

plied to the Flathead Reservation. *Confederated Tribes v. Namen,* 380 F.Supp. 349 (D. Mont. 1974). It has never been repealed although it has become inoperative but not repudiated since the advent of the Indian Reorganization Act of 1934, 48 Stat. 984.

All applicable treaties, legislative acts, general laws and executive orders are to be considered in *pari materia* in considering congressional intent with regard to the Reservation. *Stevens v. C.I.R.,* 452 F.2d 741 (9th Cir. 1971) and *Confederated Tribes v. Namen, supra.* The intent of the General Allotment Act is consistent with that found in other federal legislation. See e.g., Civil Rights Act of 1870, 42 U.S.C. 1981.

Exemption of Indians from taxation is not to be granted by implication. *Oklahoma Tax Commission v. United States,* 319 U.S. 598, 63 S.Ct. 1284, 87 L.Ed. 1612 (1943) and *Mescalaro Apache Tribe v. Jones, supra.* The language of the General Allotment Act is in accord with this policy and the conclusion that an exemption from state taxation was not intended to be available.

3. The District Court erred in holding it had jurisdiction to enjoin enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C. § 1341.

The District Court concluded it had jurisdiction to enjoin enforcement of Montana's state tax laws notwithstanding the specific prohibition in 28 U.S.C. § 1341. In doing so, it concluded the Tribes were an instrumentality in which the United States had a "real and significant interest" and therefore were within the federal instrumentality exception to 28 U.S.C. § 1341. This conclusion is contrary to the position of this Court in *Mescalaro Apache Tribe v. Jones, supra,* and *McClanahan v. State Tax Commission of Arizona, supra,* that the federal instrumentality doctrine as a basis for immunity from state taxation with respect to Indians and Indian property is no longer viable. Moreover, the Tribes acted in a proprietary rather than governmental capacity in seeking the exemption. The federal instrumentality exception does not extend to such action. Cf. *Federal*

Compress & Warehouse Co. v. McLean, 291 U.S. 17, 54 S.Ct. 267, 78 L.Ed. 622 (1934).

Jurisdiction to entertain the suit of the individual tribal members was upheld under 28 U.S.C. § 1343. This position is in conflict with *American Commuters Association, Inc. v. Levitt,* 405 F.2d 1148 (2nd Cir. 1969) and *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972) cert. den. 410 U.S. 966 (1973) holding that allegations of deprivation of civil rights involved with collection of taxes do not permit an exception to the prohibition of jurisdiction contained in 28 U.S.C. § 1341. The conflict should be resolved by this Court.

Conclusion

For the reasons stated above it is respectfully submitted that the questions presented are substantial and of great public importance. The Court should note probable jurisdiction and set the matter for argument.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, JEAN A. TURNAGE, one of the attorneys for Appellants certify that on the 28th day of June, 1975, I served a copy of the foregoing JURISDICTIONAL STATEMENT on Appellees herein by mailing true copies thereof, first class postage prepaid as follows:

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Missoula, Montana 59801

and first class air mail postage prepaid as follows:

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Jean A. Turnage

APPENDIX

OPINIONS BELOW

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, Frederick J. Houle, Jr., Secretary and A Member of the Tribes; Clarence Woodcock, A Member of the Tribes; John Barnaby, A Member of the Tribes; Abel Coombs, A Member of the Tribes, Each on Behalf of Himself or Herself and All Other Members of the Tribes,

Plaintiffs,

v.

THE STATE OF MONTANA; Department of Revenue, Keith L. Colbo, In His Official Capacity As Director, Department of Revenue, State of Montana; Wilson A. Burley, Albert Meyers, and Don Corrigan, Each In His Official Capacity As Commissioner of Lake County, and Marjorie Knaus, In Her Official Capacity As Treasurer Of Lake County; Roy M. De Long, Wesley Stearns, and Henry Kraus, Jr., Each In His Official Capacity As Commissioner of Sanders County, And June M. Thayer, In Her

Civil No. 74-40-M

ORDER AND OPINION

Capacity as Treasurer of Saunders County, and H. W. Stoutenberg, Richard Ostergren, and L. G. Browman, Each In His Official Capacity As Commissioner of Missoula County, and Sophie Cahill, In Her Official Capacity As Treasurer of Missoula County,

Defendants.

Before: BROWNING, Circuit Judge, and SMITH and JAMESON, District Judges.

PER CURIAM:

The Confederated Salish and Kootenai Tribes of the Flathead Reservation and four enrolled members of the Tribes suing on behalf of themselves and all other members of the Tribes seek a judgment (1) declaring unconstitutional the enforcement against plaintiffs of the provisions of Title 53, *Rev. Mont. Code,* §§ 114, 1025-1029, and Title 84, *Rev. Mont. Code,* §§ 201, 301, 302, 404, 406, 409, 410, 4201, and 4202 and related statutes,[1] providing for the assessment and collection of personal property taxes generally, and in particular, of personal property taxes on motor vehicles; (2) for

1. R.C.M. 1947, § 53-114 (1974 Supp.) establishes the procedure for the payment of state personal property taxes on motor vehicles. Sections 53-1025-1029 (1974 Supp.) relate to the tax on snowmobiles.

R.C.M. 1947, § 84-201 provides that: "All property in this state is subject to taxation, except as provided in the next section." R.C.M. 1947, § 84-301 (1974 Supp.) classifies property for the purposes of taxation. Section 84-302 provides the percentage of the true value of the property in each class which will serve as a basis for the imposition of taxes. R.C.M. 1947, §§ 84-404, 406, 409, 410, (1974 Supp.) establish procedures for the assessment of property. R.C.M. 1947 §§ 84-4201 and 84-4202 provide for the collection of personal property taxes and the seizure and sale of property in the event that taxes are delinquent.

an injunction restraining the enforcement of the statutes and any regulations promulgated pursuant thereto; and (3) a refund of personal property taxes paid to the date of the court's final judgment.

A three-judge court was convened pursuant to 28 U.S.C. § 2281. The plaintiffs and all of the defendants have agreed that there are no genuine issues as to any material facts and all parties accordingly have moved for summary judgment.

In the affidavits filed in support of their motion for summary judgment, the plaintiffs established that they have been required to pay Montana personal property taxes on their motor vehicles. Under Montana law, all motor vehicles must be registered and licensed before being permitted on the public streets and highways of Montana. R.C.M. 1947, § 53-119 (1974 Supp.). The payment of a registration fee and state property taxes on motor vehicles, however, is a condition precedent to the registration of motor vehicles and the receipt of license plates. R.C.M. 1947, § 53-114(3) (1974 Supp.). The plaintiffs do not challenge the vehicle registration fee, a set fee established by the legislature (R.C.M. 1947, § 53-122 (1974 Supp.), which by law is credited to the county motor vehicle fund R.C.M. 1947, § 32-3701 (1974 Supp.) and must be used for the construction, repair, and maintenance of city and county roads. R.C.M. 1947, § 32-3706 (1974 Supp.). The motor vehicle property tax, on the other hand, is based on the vehicle's assessed value and the mill levy authorized by the state and the appropriate county, school district and municipality. *See* R.C.M. 1947, §§ 53-114(4), 53-117 (1947 Supp.). Unlike the registration fee, the motor vehicle property tax is not designated a road tax and is used for general governmental purposes in the same manner as other personal property taxes. *See* R.C.M. 1947 § 53-117 (1974 Supp.).[2]

In urging summary judgment, the plaintiffs contend that the Montana statutes and regulations providing for the imposition of personal property taxes, and specifically the tax

2. Were the motor vehicle tax, like the license fee, used solely for road and highway purposes, a different question would be presented and might well result in a different holding with respect to this tax.

on motor vehicles, are unconstitutional as applied to the plaintiffs under Article I, Sec. 8, Clause 3 of the United States Constitution and are violative of the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975; the Organic Act for the Territory of Montana, 13 Stat. 85, May 26, 1864; Section 4 of the Enabling Act of the State of Montana, 25 Stat. 676, February 22, 1889; the holding of the United States Supreme Court in *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973); and this court's holding in *Confederated Salish and Kootenai Tribes* v. *Moe* (Civil No. 2145, May 10, 1974 as supplemented February 4, 1975).

The defendants in seeking summary judgment contend that this court is barred by 28 U.S.C. § 1341 from enjoining the imposition of Montana's motor vehicle tax on members of the Tribes residing on the Flathead Reservation. On the merits, defendants argue that the State of Montana has the authority to levy a property tax on motor vehicles belonging to Tribal members residing on the Reservation.

Our holding in *Confederated Salish and Kootenai Tribes* v. *Moe* is dispositive of the issues herein. In *Moe* identical jurisdictional issues were raised. We concluded that despite 28 U.S.C. § 1341,[3] this court had jurisdiction to entertain the action under 28 U.S.C. § 1362[4] with respect to the plaintiff Tribes and under 28 U.S.C. § 1343(3)[5] and 42 U.S.C. § 1983[6]

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3. 28 U.S.C. § 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

4. 28 U.S.C. § 1362 provides:
"1362. Indian tribes. — The district courts shall have original jurisdiction over all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."
28 U.S.C. § 1362 does not confer jurisdiction with respect to the individual plaintiffs but only with respect to the plaintiff Tribes.

5. 28 U.S.C. § 1343(3) provides in pertinent part:
"1343. Civil rights and elective franchise. — The district courts shall have original jurisdiction of any civil actions

with respect to the individual Tribal members. For the reasons discussed in *Moe*, we reject defendants' § 1341 argument in this case and conclude that this court has jurisdiction to entertain plaintiffs' action.

Consistent with our reasoning in *Moe*, we hold that R.C.M. 1947 §§ 53-114, 53-1025-1029, 84-201, 301, 302, 404, 406, 409, 410, 4201 and 4202 are unconstitutional in so far as they require the payment of a motor vehicle tax, and other personal property taxes, by members of the plaintiff Tribes residing on the Flathead Reservation. In Moe, this court, relying on *McClanahan, supra*, held that the State of Montana could not impose its cigarette excise tax on the sale of cigarettes by a member of the plaintiff Tribes on the Flathead Reservation to any Indian residing on the Reservation. The only difference between this case and *Moe* is the nature of the tax involved. We conclude that this difference is not so substantial as to make the cases distinguishable. The revenues derived both from the cigarette tax and the motor vehicle tax (as well as other personal property taxes) are used for general governmental purposes. The "tax event," i.e., the sale of cigarettes or the ownership of a motor vehicle as of January 1 of each year (R.C.M. 1947, § 84-406(2) (1974 Supp.)) in both cases occurs on the reservation. *Moe* and *McClanahan* are therefore controlling and

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authorized by law to be commenced by any person:
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"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

6. 42 U.S.C. § 1983 provides:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

require this court to grant summary judgment in favor of the plaintiffs.

We recognized in Moe that conditions have changed on all Indian reservations (and particularly on the Flathead Reservation) since the treaties were negotiated with the various Indian tribes, but noted, as the Court said in *McClanahan,* that it is "still true, as it was in the last century" that "the relation of the Indian tribes living within the borders of the United States...[is] an anomalous one and of a complex character." *Id.* at 173. This anomalous, semi-autonomous character of Indian tribes was recently reaffirmed by the Supreme Court in *United States* v. *Mazurie,* U.S. , 43 L.W. 4174 (January 21, 1975). The Court in holding that Congress had the authority to regulate the distribution of alcoholic beverages in Indian country and could delegate that authority to a reservation's tribal council stated:

> "...Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832); they are 'a separate people' possessing 'the power of regulating their internal and social relations....' *United States* v. *Kagama,* 118 U.S. 375, 381-382 (1886); *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 173 (1973)." 43 L.W. at 4178.

We are not insensitive to the growing concern in Montana and other states with respect to the relationship between the states and the Indians who reside on Indian reservations, particularly in the area of taxation. Judge Smith in his dissent in *Moe* delineated the nature of the conflict which is developing in the state-tribal sphere.

The relationship between the United States and Indian tribes and between individual states and Indian tribes, however, must still be determined by relevant treaties. As noted in *Moe,* any changes in the rights and privileges the Indian tribal members have enjoyed under the Treaty of 1855 must be made by treaty stipulation or by Act of Congress. If changes are deemed necessary in the relationship between the Tribes and a state, it is Congress, rather than the courts,

from whom relief must be sought.

The motion of the plaintiffs for summary judgment is granted, and the motion of the defendants is denied.

We do not consider at this time possible consequences of our holding that the motor vehicle tax and other personal property taxes may not be collected from members of the plaintiff Tribes residing on the Flathead reservation. For the reasons set forth in our Memorandum in *Moe,* dated March 19, 1975, we deem it advisable to reserve any further questions pending a final determination of the constitutionality of the statutes in question with respect to their enforcement against plaintiffs. If the parties are then unable to resolve any remaining issues in the light of that determination, they will be given an opportunity to raise those issues through appropriate proceedings.

Judgment in conformity with this order will be entered forthwith.

Done and dated March 19, 1975.

s/James R. Browning
United States Circuit Judge

s/William J. Jameson
United States District Judge

SMITH, District Judge (concurring in part and dissenting in part):

On the ground of stare decisis, *Confederated Salish and Kootenai Tribes* v. *Moe* (Civil No. 2145, D.C. Mont. 1975) I concur in that portion of the opinion which holds that the personal property including automobiles of reservation Indians, who have not been issued a fee patent, may not be taxed.

I dissent from the opinion in so far as it declares R.C.M. 1947 § 53-114 unconstitutional. I think that the state may as it did in § 53-114 condition the issuance of a license on the payment of property and license taxes. The Indian and his

property does now have sanctuary from taxation in the reservation and the Indian may drive his unlicensed untaxed automobile in the reservation as he pleases. But the sanctuary ends when off reservation state services are demanded, i.e., the right to drive on off reservation highways and the right to the protection afforded by the off reservation machinery of the Registrar of Motor Vehicles.

The Flathead treaty says nothing about the Indians' rights to license and register motor vehicles. There is no Act of Congress which requires the state to license and register untaxed Indian motor vehicles for off reservation use. In the history of Indian taxation the courts have accomplished much by inference but Congress didn't leave much room for an inference that the untaxed Indian has a right to the full gamut of state services when it said in the Montana Enabling Act:

> "The constitutions shall be republican in form, and make no distinction in civil or political rights on accounts of race or color, except as to Indians not taxed..."
>
> Act of Feb. 22, 1889, 25 Stat. 676.

I see no reason why the untaxed Indian should not pay to drive his car off reservation exactly as other citizens do. If the reservation Indian can pick and choose the taxes which he will pay in exchange for off reservation state services then in my opinion we have departed from the concept that there may be no discrimination based on race alone.

s/Russell E. Smith
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA ("TRIBES"); HAROLD W. MITCHELL, JR., CHAIRMAN OF THE TRIBAL COUNCIL, AND A MEMBER OF THE TRIBES, JOSEPH ANTHONY WHEELER, JR., A MEMBER OF THE TRIBES, AND DOROTHY E. WHEELER CLINKENBEARD, A MEMBER OF THE TRIBES, EACH ON BEHALF OF HIMSELF AND HERSELF AND ALL OTHER MEMBERS OF THE TRIBES,

Plaintiffs,

v.

JOHN C. MOE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF MISSOULA, MONTANA, WILLIAM A. PHILLIPS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF LAKE, MONTANA, THE DEPARTMENT OF REVENUE, STATE OF MONTANA, AND KEITH L.

Civil No. 2145

SUPPLEMENTAL ORDER and OPINION

COLBO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MONTANA,

Defendants.

Before: BROWNING, Circuit Judge, and SMITH and JAMESON, District Judges

PER CURIAM:

By order entered May 10, 1974 this court, with Judge Smith dissenting in part, granted in part and denied in part the plaintiffs' motion for summary judgment. By order entered July 15, 1974 the case was "reopened for the development of additional facts and submission of additional briefs."[1]

Subsequent to the reopening of the case, an answer and motion for summary judgment were filed by the defendants Department of Revenue, State of Montana, and W. A. Groff, Acting Director of the Department. Through extensive discovery, consisting of affidavits, interrogatories, and requests for admissions, the parties have developed more detailed facts with respect to the history and present status of the state-tribal relationship, and particularly the expenditures of funds by the Federal Government and State of Montana and local governments for various services on the Flathead Reservation. The facts upon which the respective parties rely may be summarized as follows:

The Flathead Indian Reservation, created by the Treaty of

1. The court recognized in the order that this is a test case, that the dissenting opinion raised questions which were not considered or briefed by counsel, and that both parties "should be given an opportunity to develop any additional facts relevant to any issue which may be raised on appeal."

Hellgate of 1855 (12 Stat. 975), consists of approximately 1,245,000 acres, of which approximately 628,642 acres are owned in fee,[2] 614,311 acres in trust either for the plaintiff Tribes (564,320 acres) or individual Indians (49,991) acres), and 1,017 acres by the United States. The Reservation is part of four Montana counties — Lake, Sanders, Missoula and Flathead.[3]

The current enrolled membership of the Plaintiff Tribes is 5,749.[4] 2,911 members reside on the reservation, of whom 2,677 live in Lake County; 744 members reside in Montana off the reservation; and 2,034 members reside outside the State of Montana. Tribal members comprise 19% of the total reservation population.

The Flathead Reservation is a well-developed agricultural area with farms, ranches and communities scattered throughout the inhabited portions of the Reservation. While some towns have predominantly Indian sectors, generally Indians and non-Indians live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike.

As Montana citizens, members of the Tribe are eligible to vote and do vote in city, county and state elections. Some hold elective and appointed state and local offices. All services provided by the state and local governments are equally available to Indians and non-Indians.[5] The only schools on the Reservation are those operated by school

2. From affidavit of Secretary of the Tribe. Some of the fee land is owned by Indians and some by non-Indians. 60,843 acres were granted to the State of Montana for school purposes.

3. 651,618 acres are in Lake County, 460, 835 in Sanders County, 104,422 in Missoula County and 27,094 in Flathead County.

4. 166 are full blooded Indians; 1,496 from one-half to full blood; 2,372 one-half to one-quarter; 975 one-quarter to one-eighth; and 581 one-eighth to one-sixteenth degree Indians.

5. Among the services provided are sanitary sewage and solid waste disposal facilities and public water systems. Members of the Tribes received aid to dependent children (75% of which is paid by the Federal Government) and welfare benefits from the State of Montana. They par-

districts of the State of Montana. The State and local governments have built and maintain a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction.

The Montana cigarette tax is 12 cents on each package sold within the state. 4.5 cents of the tax is allocated by state law to the state's general fund. The general fund is used for the support of state government, including the state institutions and the state educational system,[6] all of which provide service to Indians and non-Indians alike. The cigarette tax loss to the State of Montana resulting from the sale of cigarettes on the Flathead Reservation for the years 1972, 1973 and the first half of 1974 exceeded the sum of $591,000.

All of the "smoke shops" on the Reservation are on land held by the United States in trust for the Plaintiff Tribes. The land is leased from the Tribes upon the Tribal Council's approval of the lessee's plan to erect a smoke shop. The Council controls the purchase of cigarettes for resale by Tribal members and charges an administrative fee in connection therewith. Although the Tribes are authorized by their constitution to tax, the Tribes have not imposed any tax on the cigarettes sold in the smoke shops.

As set forth in our order of May 10, 1974, it was recognized in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 n. 12 (1973), that while the State of Arizona expended tax moneys for education and welfare within the confines of the Navajo Reservation, the Federal Government likewise made substantial payments for various purposes. We stated that the same was true with respect to the Flathead Reservation in Montana. The facts developed in the discovery subsequent to our order confirm this conclusion.

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ticipate in social and rehabilitation services in various state institutions. Eligible members receive veteran bonuses paid by the State with revenue derived from cigarette taxes.

6. Members of Plaintiff Tribes have also participated with other Indians in fee waivers granted by the University of Montana, totaling $130,000 in 1973-74. During the same period the Bureau of Indian Affairs granted scholarships totaling $82,150.00 to 83 enrolled members of the Plaintiff Tribes for study at Montana universities and colleges.

It appears from the affidavit of the Secretary of the Interior that for the fiscal year 1974 the Federal Government expended $6,436,614.53 in connection with the supervision of the affairs of Indians on the Reservation, comprising the following:

Bureau of Indian Affairs	
Flathead Agency	$2,188,529.53
Indian Public Health Service (HEW)	1,722,997.00
Kicking Horse Manpower DevelopmentCenter Tribal Contract — Department of Labor	$1,362,850.00
CAP, Tribal Community Action Program	169,000.00[7]
Manpower Programs	280,180.00
EDA (Economic DevelopmentAdministration)	391,298.00[8]
HEW — 874 Funding Assistance to Public Schools	321,760.00[9]
	$6,436,614.53

The expenditures included programs in education, social services, housing improvement, employment assistance, adult vocational training, law and order, forestry, range

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7. This is the only Community Action Program on the Reservation and serves both Indians and non-Indians.

8. Apparently the Tribally sponsored Economic Development Program was instrumental in obtaining grants for water and sewer systems in the Reservation towns of Dixon and Pablo.

9. The Government's payment for public school assistance, pursuant to P.L. 874, while substantial, is not proportionate to the amounts contributed by the state, counties and school districts, considering the number of Tribal members enrolled in the public schools. For example, during the academic year 1972-1973, Tribal members accounted for approximately 27% of the student body enrollment in the public schools located on the Reservation. During that period, the state, school districts and counties contributed funds totalling $3,738,684.00 while the Government under P.L. 874 contributed $356,735.00, or about 9% of the total. It is important to note, however, that this comparison does not take into account the real property taxes paid by Tribal members which are used in part to support the state educational system.

management, reservation programs, soil and moisture conservation, road construction and maintenance, real property management, general trustee services, and Indian business development.

The Tribes expended tribal funds of $5,398,792.86 during fiscal year 1974 as follows:

Tribal Budget	$4,365,887.00[10]
Federal Contracts, etc.	390,178.38
Credit Enterprise	66,868.79
Hot Springs Enterprise	30,742.29
Forest Management Enterprise	545,116.40
Total	$5,398,792.86

These funds were derived from moneys earned by the Tribes through sale and lease of tribal property and operating tribal enterprises.

In spite of the extensive discovery, it is impossible to compare with precision the expenditures by the Federal Government for the Indians living on the Reservation with the amounts spent by the state and local governments. To a large extent the expenditures relate to different services. As a result, we are unable to determine with exactitude the net effect of the loss of tax revenues to the state and local governments because of the unique status of the Reservation and the Indians living thereon. It is clear, however, that (a) the amount contributed by the Federal Government is substantial; (b) the funds expended by both the Federal Government and Tribes contribute to the economic well-being of the Reservation, (c) non-Indians benefit from at least part of the expenditures; and (d) funds are expended for many programs unique to tribal government.

Defendants contend that the Tribal members living on the

10. Plaintiff Tribes provide law and order, including a court system. They also provide other community services, including health care, special assistance (burials, fires, welfare), employment assistance, housing, tribal projects (support of Indian community events) and administration of programs unique to tribal government.

Flathead Reservation are now so completely integrated with the non-Indians, sharing in all of the services furnished by the state and local governments, that there is no longer any reason to accord them different treatment than other citizens. Defendants argue in their supplemental memorandum:

> "The rationale of treating Indians differently from non-Indians starting with *Worchester* v. *Georgia*, 6 Pet. 515 (1832) arose out of another age and another time. Indians, like many, many other minority groups were not then citizens and were not members of society in the usual sense. That situation no longer prevails. The Plaintiff members are citizens of the United States and Montana and enjoy all of the benefits of citizenship. They are a part of this society and participate fully in it."

It is true that conditions have changed on all Indian reservations since the treaties were negotiated with the various tribes.[11] As noted in our order of May 10, 1974, this was recognized in *McClanahan, supra* at 173, n. 12, but the Court concluded that it was "still true, as it was in the last century" that the relationship of the Indian tribes is "an anomalous one and of a complex character" and that conferring "rights and privileges on these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization."[12] Plaintiff Tribes have not abandoned their tribal organization. Any changes in the rights and privileges they have enjoyed under the Treaty of 1855 must be made by treaty stipulation or by Act of Congress.

Nor can we accept defendants' contention that treatment of Indians on the Flathead Reservation for tax purposes differently from other citizens "is repugnant to the

11. It may be assumed also that integration on the Flathead Reservation is more complete than on most reservations.

12. Quoting from *The Kansas Indians*, 5 Wall. 737, 757 (1867).

fundamental principles of due process and equal protection." The exemption of Indians from the state cigarette tax and other taxes is not based on race. Rather, relevant treaties and federal statutes serve as the basis for the distinction between reservation Indians and all others in the imposition of state taxes. The entire history of Indian law attests to that fact.

In the recent case of *Morton* v. *Mancari,*[13] 94 S.Ct. 2474 (1974), the Court reviewed various statutes and decisions according special treatment to Indian tribes and reservations, saying in part:

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." At 2483-2484.
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> ***
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> "On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. See, e.g., *Board of County Comm'rs* v. *Seber,* 318 U.S. 705, 63 S.Ct. 920, 87 L.Ed. 1094 (1943) (Federally granted tax immunity); *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (same); ...This unique legal status is of long standing, see *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 8 L.Ed. 25 (1831); *Worcester* v. *Georgia,* 6 Pet. 515, 8 L.Ed. 483 (1832), and its sources are diverse... As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." At 2485.

Finally we are unable to agree with plaintiffs' contention that Tribal members who receive fee patents under the terms of the General Allotment Act of 1887 and who continue to reside on the Reservation are subject to all of the tax laws of the State of Montana.[14] The General Allotment Act provided in pertinent part:

> "At the expiration of the trust period, and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348 of this title then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law..."

As the Supreme Court noted in *Mattz* v. *Arnett,* 412 U.S. 481, 496 (1973), when the Allotment Act of 1887 was enacted, "Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." In a footnote the Court continued: "The policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 38 Stat. 984, now amended and codified as 25 U.S.C. § 461 *et seq*." The Court found the Allotment Act of 1892, which did not "differ materially" from the Act of 1887, "completely consistent with continued reservation status." *See also Seymour* v. *Superintendent,* 368 U.S. 351,

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13. In *Morton* v. *Mancari,* the Court held that preferential employment of Indians by the Bureau of Indian Affairs did not constitute "racial discrimination in violation of the Due Process Clause of the Fifth Amendment."

14. Presumably some of the allotees who received fee patents still own the patented land and reside on the Reservation. In other cases, allottees have conveyed to other persons, both Indians and non-Indians, or the land is held by heirs or devisees of the original allottees.

356-358 (1962.[15]

Counsel have not cited, nor have we found, any case recognizing a distinction between reservation Indians who hold fee patents as a result of the Allotment Acts and other reservation Indians with respect to their status and privileges as reservation Indians.

We adhere to the conclusion set forth in our orders of October 10, 1973 and May 10, 1974 that Montana may not impose its cigarette tax upon sales of cigarettes on the Flathead Reservation between members of the Tribes; nor may Montana require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer's license.

We adhere also to our conclusion in the May 10, 1974 order that in selling cigarettes to non-Indians the Indian seller is involved with non-Indians to a degree which permits the State of Montana to require precollection of the tax imposed upon the non-Indian. The reasons for this conslusion are set forth in the May 10, 1974 order.

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15. The Solicitor of the Department of the Interior has described the grant of state jurisdiction in Section 349 as follows:

> "Such complexities and distinctions as these have rendered the grant of State jurisdiction over Indians contemplated by the General Allotment Act largely ineffective. The sponsors of that legislation assumed that the allotment to the Indians in severalty would be but the prelude to the termination of their tribal relations and the liquidation of Federal supervision over them. When that program failed to be carried out, and the Indians, despite the fact that they are now citizens, continued to maintain their tribal relations and the Government continued its guardianship over them, the subjection of the Indians to the jurisdiction of the States ceased to have much reality. State law-enforcement officers could not, after all, go around with tract books in their pockets, and being unable to distinguish a patent-in-fee Indian from a ward Indian, they did not commonly concern themselves with law violations by Indians, and the theoretical jurisdiction of the States thus fell into innocuous desuetude. Thus, when it has been desired to confer on particular States criminal or civil jurisdiction over Indians, it has been accomplished by general statutes conferring such jurisdiction, irrespective of the tenure by which Indians held their lands." Opinion M-36184, February 15, 1954, 61 I.D. 298, 304.

In our May 10 order we noted that the United States Supreme Court had remanded *Tonasket* v. *Washington*, 411 U.S. 451 (1973), to the Supreme Court of Washington for reconsideration in light of a Washington statute enacted in 1972 (§§ 6 and 7 of c. 157, 1972 Extraordinary Session Laws of the State of Washington) and the decision in *McClanahan*. In an opinion entered August 8, 1974 the Washington Court held that Public Law 83-280 permitted "extension of the state cigarette excise tax to Mr. Tonasket's retail sales to non-Indians" and found no mandate in *McClanahan* to preclude this conclusion. *Tonasket* v. *State of Washington*, 525 p.2d 744.

On the other hand, the Supreme Court of Idaho in *Mahoney* v. *State of Idaho Tax Commission*, 524 p.2d 187 (1974), *cert, den.* U.S. (Dec. ,1974) held that "the Idaho Tax Commission had no jurisdiction to tax the on-reservation sale of cigarettes by an Indian seller whether the purchasers were Indians or non-Indians," relying on the Commerce Clause, U.S. Const. Art. I, Sec. 8, Cl. 3. We are not persuaded that the reasoning in *Mahoney* should be followed under the statute and factual situation involved in this case.

Nor are we persuaded that the precollection of the tax imposed upon non-Indian consumers interferes with Tribal self-government, as Plaintiff Tribes contend. We have recognized that the tax is not applicable to Indian consumers residing on the Reservation. The fact that the Tribes collect a small rent and administration fee from operators of "smoke houses" does not justify sales to non-Indians without payment of the tax. These sales are not for the benefit of the Tribes, but rather for non-Indian consumers, who are obligated to pay the tax, and the two Indian sellers who have a competitive advantage in selling cigarettes to non-Indians without precollecting the tax.

The motion of the plaintiffs for summary judgment is granted to the extent that the court holds as a matter of law that (1) the cigarette excise tax imposed by the State of Montana is invalid with respect to the sale of cigarettes by a member of Plaintiff Tribes on the Flathead Reservation to any Indian residing on the Reservation; and (2) the cigarette dealer's license tax imposed by the State of Montana is valid

with respect to a member of Plaintiff Tribes selling cigarettes on the Reservation. In all other respects the motion of plaintiffs is denied and the motion of the defendants for summary judgment is granted.

Plaintiffs will prepare, serve and lodge proposed judgment consistent with this order and supplemental opinion forthwith.

Done and dated February 3, 1975.

s/James R. Browning

United States Circuit Judge

s/William J. Jameson

United States District Judge.

SMITH, District Judge (dissenting):

I agree that this court has jurisdiction and I agree, although for reasons different from those expressed in the per curiam opinion, that cigarette sales to non-Indians should be taxed.

I dissent[1] from so much of the per curiam opinion as denies the State the power to tax all cigarette sales on the Flathead Reservation.

I am aware that the decision in *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164 (1973), and the dictum in *Mescalero Apache Trive* v. *Jones,* 411 U.S. 145, 148 (1973), cast grave doubt upon the position[2] I take, but, even conceding the validity of *McClanahan,* I think it would be wrong to

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1. The dissenting opinion filed May 10, 1974, is withdrawn and this opinion substituted.

2. See *Mahoney* v. *State Tax Comm'n,* Idaho , 524 P.2d 187 (1974), *cert. denied,* U.S.

apply that decision to the Flathead Reservation and I believe that there are considerations here involved never discussed by the Supreme Court which are sufficient to justify a refusal to apply the rule of a Navajo case to the completely different Flathead Reservation.

The Flathead Reservation was created by the Treaty of 1855, 12 Stat. 975. The Act of April 23, 1904, 33 Stat. 302, provided for allotments in severalty to members of the tribe "under the provisions of the allotment laws of the United States" and for the sale of the surplus unallotted agricultural lands. President Taft on May 22, 1909, proclaimed that the surplus unallotted land should be opened for settlement under the Homestead Laws, and on May 24, 1909, the Secretary of the Interior promulgated regulations for the settlement of such lands. As a result of all of this lands were allotted to individual Indians in severalty and lands were sold to non-Indians under the Homestead Laws. Some of the lands allotted to individual Indians passed into non-Indian ownerships.

The reservation consists of approximately 1,250,000 acres, of which 615,618 acres is Indian trust land. Because the allotments in severalty were made of the agricultural land, the greater part of the trust land is in foothills and mountains. The total resident membership of the tribe is 19 percent of the population within the boundaries of the reservation. The racial mixture is as shown in note 4 of the supplemental per curiam.

Congress over the years provided for the establishment of the Flathead Irrigation Project. Acts of April 30, 1908, 35 Stat. 83; May 29, 1908, 35 Stat. 448; March 3, 1909, 35 Stat. 795; April 4, 1910, 36 Stat. 276; April 12, 1910, 36 Stat. 296; August 9, 1912, 37 Stat. 265; August 24, 1912, 37 Stat. 526; and May 18, 1916, 39 Stat. 138. The Act of May 10, 1926, 44 Stat. 464, provided that irrigation districts created and operated under the state law should be utilized for the collection of moneys needed for the operation and maintenance of the project and the repayment to the United States of funds advanced for the construction of the Flathead Irrigation Project. An elaborate irrigation system was built and extensive power projects established to provide power for pump-

ing and for domestic and commercial use on Indian and non-Indian lands on the Flathead Reservation. The Flathead Reservation is now a well-developed agricultural area.

Indians and non-Indians are randomly scattered over the whole of the cultivated portion of the reservation. Towns and villages have developed, occupied by non-Indians and Indians alike. In the towns, banks, businesses, and professions provide services to the Indians and non-Indians. There are no licensed Indian traders on the Flathead Reservation.

As the non-Indian settlers moved in, school districts were created. From the beginning these districts, supported by state and local taxes have some federal help, operated integrated schools. Now a system of state highways and county roads, built and maintained by federal, state, and county moneys, serve the urban and rural residents of the reservation. Indians do vote and are eligible to and do participate fully in the state government at all levels. Until the decision of the Supreme Court in *Kennerly* v. *District Court,* 400 U.S. 423 (1971), the civil law of Montana did (except in matters involving federal law) in fact form the basis of decision in cases arising on the reservation between Indians and Indians, Indians and whites, and whites and whites. Until recently Indians did pay state excise taxes and property taxes except on trust lands.

In 1935 the Tribe incorporated under the provisions of the Indian Reorganization Act, 25 U.S.C. § 461, et seq., 48 Stat. 984 (1934), and in 1965 accepted the criminal jurisdiction of the state, pursuant to Pub. L. No. 280, 67 Stat. 588 (1953), and R.C.M. 1947 §§ 83-801, et seq. *See State ex rel. McDonald* v. *District Court,* 159 Mont. 156, 496 P.2d 78 (1972). The jurisdiction of minor crimes is concurrently shared by the state and tribal courts. The case of *Kennerly* v. *District Court, supra,* does deprive the Indian of the right to the use of the state courts in civil disputes with other Indians, but the State of Montana and the Counties of Lake, Sanders, and Flathead, except as limited by the decision in *Kennerly,* offer to Indians and the Indians do use a full measure of state and local government services.

In 1887 Congress enacted the General Allotment Act. 25

U.S.C. § 349, 24 Stat. 390. Section 6 of that Act provided:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law....

Had the provisions of the General Allotment Act continued to operate, the problems we face here would not have arisen. Patents would have issued and ultimately the state civil law would have been applicable to all.[3]

The Indian Reorganization Act, 25 U.S.C. § 461, et seq., 48 Stat. 984 (1934), although it did not repeal the General Allotment Act, did, by stopping the flow of patents under it, make its citizenship and state law provisions inoperative.

In light of this history I turn to the problem of jurisdiction,[4] and as a prelude to that I examine the relationship of the Indian to the State.

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3. I do not agree with the position taken in the majority opinion as to the status of the Indians who received fee patents. They were, as individuals, even though within the exterior boundaries of the reservation, made subject to state law by the language of the General Allotment Act. Nothing has ever changed that. No doubt, as said in *Matz* v. *Arnett,* 412 U.S. 481, 496 n. 18 (1973), "[t]he policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984...." but that Act did not purport to affect the status of the individual Indians.

4. If the term "jurisdiction" denotes the power of a sovereign to impose its laws upon persons and relationships and a lack of jurisdiction denotes the incapacity of that sovereign to affect persons and their relationships by its laws, then I assume that a lack of jurisdiction extends not only to taxes but to other relationships as well. If this is so, then this case and others may well be placing in limbo all sorts of legal relationships. The reservation Indian employed in a sawmill may well have cause to be concerned about his status under the Workman's Compensation Laws of Montana. Is he covered if employed on the reservation by a reservation Indian? — a non-reservation Indian? — a white? If he is not covered, then where does he find his common law remedies?

No case that I have seen considers the effect of the Act of June 2, 1924, 43 Stat. 253, conferring citizenship upon Indians regardless of the status of their land patents. When Congress made Indians citizens of the United States, it made them citizens of the states in which they reside.[5] By virtue of the 15th amendment[6] it made them eligible to vote. I believe that it also placed them under the jurisdiction of the states to the extent necessary to qualify them for 14th amendment protection. I am unwilling to conclude that when Congress expressly granted citizenship to Indians it withheld from them the equal protection of state laws.[7]

If Congress did, by making Indians citizens of the states, vest them with rights under state law, did it at the same time protect them from any of the burdens of state citizenship? Did it give them the right to vote taxes without having to pay them, the right to hold state office without bearing some part of the burden of paying the salary of that office?[8] It has been the policy of Congress to equalize, without regard to race, the benefits and the burdens of government.

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5. "An Indian, becoming a citizen of the United States and residing in a state, is held to be a citizen of that state. *Boyd* v. *Nebraska,* 143 U.S. 135-162, 12 S.Ct. 375, 36 L.Ed. 103. Matter of Heff, 197 U.S. 448 (sic), 25 S.Ct. 506, 49 L.Ed. 848. The latter case was overruled by *U.S.* v. *Nice,* 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192, but on another point." *Deere* v. *New York,* 22 F.2d 851, 852 (N.D.N.Y. 1927). *See also* F. Cohen, Handbook of Federal Indian Law 156 (University of New Mexico Press, 1942).

6. "AMENDMENT XV — UNIVERSAL MALE SUFFRAGE

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

"Section 2. The Congress shall have power to enforce this article by appropriate legislation."

7. We do not deal here with equal protection as it might affect the relationship between the individual Indian and the tribe, nor as between the individual Indian and the United States. See note 12.

8. I recognize that it did do this in part by exempting Indian trust lands from taxation, but when we deal with the taxation of trust lands we deal not with implications but with exemptions repeatedly and expressly stated whenever Congress has acted and, at least in the case of the State of Montana, with exemptions stated in the Enabling Act.

The Civil Rights Act of 1870, 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[9]

The policy of the Civil Rights Act of 1870 was expressly made applicable to some Indians by the General Allotment Act, 25 U.S.C. § 349, 24 Stat. 390 (1887), which has not been expressly repealed. That Act most unequivocally provided that when citizenship was achieved the Indian "shall have the benefit of and be subject to the laws, both civil and criminal, of the state." *See Goudy* v. *Meath,* 203 U.S. 146 (1906). By specific congressional mandate equal protection followed citizenship.

The Montana Enabling Act specifically indicated as to Indians that political rights and burdens are related, in this language:

> ...The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed.... Act of February 22, 1889, 25 Stat. 676

Only the taxed Indian was thought to have civil and political rights within the states.

I believe that we are faced with a choice of inferences. We may infer that Congress placed the Indians beyond the jurisdiction of the state to tax or that it did not.[10] But as I see

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9. It has been held that this section does not apply to Indians in their relationship to the tribe. *Spotted Eagle* v. *Blackfeet Tribe,* 301 F. Supp. 85 (D.Mont. 1969). The effect of 42 U.S.C. § 1981 has not been considered as to the Indians in relationship to the state.

10. Again we are not here concerned with the power of Congress to tax and spend in the discharge of what Congress deems to be the federal obligation to Indians.

it, the exercise of a federal power in such a way as to at the same time extend to Indians all state rights and withhold from them all state burdens poses some constitutional problems. Were non-Japanese residents of a state forced to pay taxes to provide state services for the Japanese residents, who were exempt from taxation solely because of their race, then the non-Japanese would be bearing an unequal burden. Were Congress by statute to direct a state to exempt all Japanese from state taxation I think that Congress would be requiring the state to violate the equal protection concept embraced in the fifth amendment.[11] Although a taxing authority has an almost unlimited power to classify, I apprehend that race alone would never be a valid basis for classification.

The Japanese is, of course, entitled to a full measure of state services by virtue of the 14th amendment. The analogy to the Japanese fails if the Flathead Indian is not entitled to state services — if the State of Montana can refuse to admit Indian children to its schools, Indian young people to its colleges, and refuse to extend welfare benefits to the Indian poor and aged. In that event no unequal burden is placed upon the non-Indian and the equal protection problem disappears.

If, as I view it, the Flathead Indian is entitled to a full measure of Montana state and local government services, then I think the federal government may not, without invading the constitutional rights of non-Indian taxpayers, exempt Indians from the burdens of state taxation except to the extent that the people of the state accepted the congressional exemption stated in the Enabling Act. Stated differently, Congress has the power to require that Indians be not deprived of the equal protection of state laws, and it has the power to exempt the Indian from state taxation, but in my opinion the exercise of both of these powers at the same time

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11. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

would deprive non-Indians of equal protection.[12]

If that is so, then I cannot infer the exercise of both powers and, given a choice of inference, I would, for the reasons stated, infer that the Flathead Indians are sufficiently within the jurisdiction of the State of Montana to be entitled to state services and, except as to trust lands, subject to state taxation.

Other considerations tend, in my opinion, to confirm this view. Congress is aware of state taxation and has in specific instances found plain language to express various Indian exemptions from various state taxes.[13] Congress has been extremely careful to specifically exempt from state taxation Indian trust lands. The exemption appears in the Montana Enabling Act which speaks of lands and *only* lands in terms of both federal jurisdiction and federal control,[14] and specifi-

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12. I do not regard *Morton* v. *Mancari*, 417 U.S. 535 (1974), as contrary. That case involved the Indian in relationship to the federal government and not the Indian in relationship to the state. Even with respect to the federal government the opinion is carefully limited to the problem of preferential employment in the Bureau of Indian Affairs, which was related to "Indian self-government." Perhaps it can be said that granting Indians an exemption from cigarette taxation "is reasonable and rationally designed to further Indian self-government," but I don't think so.

Where unequal rights are enjoyed by the Indian because "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." (at 551) then it would seem that the inequality could be justified only in terms of that relationship. If the guardian requires that the ward be the beneficiary of the state's services and the ward accepts those services, then the new relationship of the ward is out of the orbit of federal management and the inequality should not persist as to the new relationship.

13. See 25 U.S.C. §§: 564, 749, 498, 853, 898, 937, 955, and 963, and 25 U.S.C.A. (pocket part) §§: 656f, 589, 594, 609b-1, 610b, 645, 648, 662, 676b-1, 690, 788b, 881, 883c, 967c, 1013, 1036, 1073, 1087, 1104, 1120, 1134, 1146, 1154, 1165, 1171, 1185, 1194, 1204, 1211, 1225, 1234, 1246, 1252 (Flathead), 1264, 1273, 1282, 1296, 1300a-3, 1300b-4, 1300c-4, 1300d-8, and 1300e-6.

14. In *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 69, (1962), the Court said of this language: "The disclaimer of right and title by the State was a disclaimer of proprietary rather than governmental interest."

cally in terms of taxation:

> ...But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress, containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such acts of congress may prescribe. R.C.M. 1947, Vol. 1, p. 69

The fact that Congress expressly prohibited the states from taxing lands exempt by federal law is pregnant with the thought that Congress did think that, absent federal restriction, Indian property might be taxed.

The Supreme Court in *McClanahan* v. *Arizona State Tax Comm'n, supra,* at 176, has said that the language of the Buck Act (4 U.S.C. § 109, 54 Stat. 1059 (1971)): "'[n]othing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian *not otherwise taxed*...'" (emphasis supplied) clearly expresses a congressional intent to maintain the tax-exempt status of Indians. With all deference I read Section 109 differently. Had the section ended with the word "Indian," then I would find a purpose to exempt Indians or preserve an exempt status. But it seems to me that by adding the words "not otherwise taxed" Congress specifically recognized the possibility that Indians might be subject to state sales and income taxes. The Buck Act as respects taxation maintained the status quo as to reservation Indians and nothing more.

The Act of Congress (25 U.S.C. §§ 1321-1326) providing a method whereby the states may assume jurisdiction over Indian tribes is cited in *McClanahan*. However, the concern of Congress was, as is evident from the language of the Act, with state court assumption of and with the jurisdiction of state courts to try civil and criminal cases. Where the Act

speaks of taxes it makes its purpose unmistakably clear:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States... 25 U.S.C. § 1321(b)

Identical language is repeated in 25 U.S.C. § 1322(b). This language confirms my thought that when Congress wanted to exempt something from state taxation it had no difficulty finding words to express that intention. I believe that these sections indicate that Congress intended to exempt from state taxation that which it had carefully spelled out in so many other statutes and what it then believed to be exempt, i.e., trust property and trust property alone.

The Indian Reorganization Act of 1934 (Wheeler-Howard Act, 25 U.S.C. §§ 461, et seq.) does not, as I see it, cast any light upon the problems of state taxation of the individual Indian except that it, too, shows that Congress knows how to express explicit exemptions when it wants to. It is probable that Congress did not realize that by halting the allotment of Indian lands and then making the provisions of the General Allotment Act ineffective, it was creating problems. It is likely that had Congress seen the problem (i.e., was there to be a difference between the Indians who in 1934 had received fee patents and were subject to state law, and a new generation of Indians who would not receive patents and who were, therefore, not automatically made subject to state law by the General Allotment Act?) it would have done something about it one way or the other. I doubt that any worthwhile inferences are to be drawn from the Wheeler-Howard Act.

It appears to me that there is something fundamental in the idea that the rights of citizenship carry the burdens of citizenship and that no inquiry into the duty of an individual to pay taxes is complete without an inquiry into the citizenship of that individual. (We are concerned with individuals, not tribes.) I would infer that citizenship carries with it the

burden of citizenship and absent any clear language to the contrary I would find that to be the congressional intent. I do not, in the history and circumstances of the Flathead Indians, find that contrary language.

If the result in *McClanahan* were based on implication of tax exemption rather than on a lack of jurisdiction I would have no difficulty in distinguishing it from the case of bar and would find no tax exemptions on the Flathead Reservation except as to trust lands.

The rule that tax exemptions are not to be granted by implication applies to Indians. *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598 (1943); *Mescalero Apache Tribes* v. *Jones, supra.*[15]

The Flathead Reservation and the Navajo Reservation are not now the same and do not have the same history. Different facts justify different results, even where the subject matter is Indians or Indian reservations.[16] Allotments in

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15. "This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co.* v. *Helvering,* 307 U.S. 57, 60. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, 'If the exemption had been intended, it would doubtless have been expressed.' *Cherokee Tobacco,* 11 Wall. 616, 620. In holding the income tax applicable to Indians, the Court said, 'The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted....If the exemption exists it must derive plainly from agreements with the Creeks or some Act of Contress dealing with their affairs.' *Superintendent* v. *Commissioner, supra,* 420. If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." *Oklahoma Tax Comm'n* v. *United States, supra,* 606-607. *Squire* v. *Capoeman,* 351 U.S. 1 (1956), may point to, although it does not express, a different rule where the taxing power of Congress comes into conflict with the interest of a ward of the United States.

16. "The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester* v. *Georgia, supra*; and, unlike the Indians involved in *The Kansas Indians* case, *supra,* they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions." *Oklahoma Tax Comm'n* v. *United States, supra,* at 603.

severalty were not made on the Navajo Reservation and the provisions of the General Allotment Act never applied to the Indians on that reservation. There are no non-Indian ownerships within the exterior boundaries of the Navajo Reservation. The Navajos live to themselves — largely apart from the non-Indian community. The non-Indians on the reservation, such as Indian traders and government officials, are the invitees of the tribe or the federal government. What was said in *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U.S. 685, 691 (1965):

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal Government has provided for roads, education and other services needed by the Indians...

and further at 691:

> ...And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax...

cannot be said of the Flathead Reservation.

The language in *McClanahan* v. *Arizona Tax Comm'n, supra,* 173:

> ...When the relevant treaty and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant...

could not be applied to the Flathead Reservation. There was no tradition of sovereignty on that reservation until 1934. Major crimes were punished at the federal level and until at least 1935 minor crimes at the state level. There were no tribal courts until after the enactment of the Indian Reorganization Act in 1934. State courts did exercise jurisdiction over civil cases until the decision in *Kennerly* v. *District Court, supra.* The whole body of state civil law was thought

to be applicable to non-Indians and Indians alike. Except as to trust lands Indians paid taxes as did others. The state irrigation district laws were specifically utilized in connection with the irrigation of reservation lands.

What was further said in *McClanahan* at 175:

> Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation...
>
> cannot be said of the Flathead Reservation because at least until 1934 Indians were specifically made subject to state jurisdiction when they received fee patents, as many of them did, and if Congress assumed that state laws did not apply, its undisclosed assumption was not shared by the Indians or whites living on the reservation who never questioned the matter until the decision in *Kennerly* v. *District Court, supra.* The whole body of state civil law was thought to be applicable to non-Indians and Indians alike. Except as to trust lands Indians paid taxes as did others. The state irrigation district laws were specifically utilized in connection with the irrigation of reservation lands.

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To paraphrase Mr. Justice Black in *Oklahoma Tax Comm'n* v. *United States, supra,* at 603, the

underlying principles on which the Navajo decisions are based do not fit the situation of the Flathead Indians.

s/Russell E. Smith

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA ("TRIBES"); HAROLD W. MITCHELL, JR., CHAIRMAN OF THE TRIBAL COUNCIL, AND A MEMBER OF THE TRIBES, JOSEPH ANTHONY WHEELER, JR., A MEMBER OF THE TRIBES, AND DOROTHY E. WHEELER CLINKENBEARD, A MEMBER OF THE TRIBES, EACH ON BEHALF OF HIMSELF AND HERSELF AND ALL OTHER MEMBERS OF THE TRIBES,

Plaintiffs,

v.

JOHN C. MOE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF MISSOULA, MONTANA, WILLIAM A. PHILLIPS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF LAKE, MONTANA, THE DEPARTMENT OF REVENUE, STATE OF MONTANA, AND KEITH L. COLBO, INDI-

Civil No. 2145

ORDER AND OPINION

VIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MONTANA,

Defendants.

Before: BROWNING, Circuit Judge, and SMITH and JAMESON, District Judges

PER CURIAM:

This is an action by the Confederated Salish and Kootenai Tribes of the Flathead Reservation and three enrolled members of the Tribes, suing on behalf of themselves and all other members of the Tribes, "seeking to declare unconstitutional the enforcement against plaintiffs of Title 84, *Rev. Mont. Code* §§ 5606 *et seq.*, the Montana cigarette sales tax and dealer licensing statutes" and for an injunction restraining the enforcement of the statutes and any regulations promulgated pursuant thereto.[1] A three-judge court was convened pursuant to 28 U.S.C. § 2281.

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1. Section 84-5606, R.C.M. 1947, imposes an excise tax upon cigarettes sold or purchased in the State of Montana. Subsection (1) reads:

> "All taxes paid pursuant to the provisions of this section shall be conclusively presumed to be direct taxes on the retail consumer precollected for the purpose of convenience and facility only. When the tax is paid by any other person such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Any person selling cigarettes at retail shall state or separately display in the licensed premises a notice of the tax included in the selling price and charged or payable pursuant to this section. The provisions of this subdivision shall in no way affect the method of collection of such tax as provided by this section."

Section 84-5606.5 imposes a retailer's license tax and a "retailer" is defined by § 84-5606.2(j) as "any person other than a wholesaler, who is engaged in the business of selling cigarettes at retail."

The defendants named in the complaint, John C. Moe, Sheriff of Missoula County, and William A. Phillips, Sheriff of Lake County, filed motions to dismiss, Phillips including a motion to join the Department of Revenue of the State of Montana as a necessary party defendant. Plaintiffs filed a motion for summary judgment with supporting affidavits.[2]

In an opinion dated October 10, 1973[3] we held that (1) this court has subject matter jurisdiction of plaintiffs' claims; and (2) under *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), "Montana may not impose its cigarette tax upon sales of cigarettes on the Flathead Reservation between members of the Tribes; nor may Montana require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer's license." The opinion noted that "the sole question on which there is any substantial dispute on the merits is whether the State of Montana may require an enrolled member of the Tribes who sells cigarettes on the Flathead Reservation to a non-Indian to 'precollect,' the Montana cigarette Tax, and that the procedural questions raised by defendants, i.e., the need for absentention and the propriety of a three-judge court, "might well be obviated by the addition of the Department of Revenue as a party defendant."

Plaintiffs filed a motion to add as defendants the Department of Revenue and its Director, and this motion was granted on November 2, 1973. Supplemental memoranda with respect to the application of the cigarette tax to a sale to a non-Indian have been filed by plaintiffs and by the Department of Revenue and the Attorney General of Montana for defendants. The defendant Moe filed a supplemental motion to dismiss, which has been denied in a separate order.

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2. No counter affidavits have been filed, but the defendant Moe filed a motion to hold plaintiffs' motion for summary judgment in obeyance pending determination of defendants' motions to dismiss.

3. Portions of the opinion of October 10, 1973 will be repeated in this order and opinion.

Factual Background

It appears from the allegations in the complaint and the affidavits filed in support of plaintiffs' motion for summary judgment that the plaintiff Wheeler,[4] a member of the Tribes, leased from the Tribes small tracts of trust land within the Flathead Reservation. On these tracts, one of which is in Missoula County, the other in Lake County, Wheeler, who did not have a state license to sell cigarettes, established retail stores which sold cigarettes to which state tax stamps were not affixed.

On April 13, 1972 Wheeler was arrested by deputies of the Missoula County Sheriff's Office for selling cigarettes on the Missoula County tract without a state license and for not having a state cigarette tax stamp affixed to each package sold. Subsequently, sheriff's deputies confiscated approximately 1,350 cartons of Wheeler's cigarettes. At the time of both the arrest and confiscation the deputies tore down signs on the door of Wheeler's store advertising cigarettes for sale. Also on April 13, 1972 officers from the Lake County Sheriff's Office arrested the plaintiff Clinkenbeard, the keeper of Wheeler's store located on the Lake County tract, for the same offenses. No cigarettes were confiscated from this store.

Contentions of Parties

Plaintiffs contend that the application of Montana's cigarette tax and dealer licensing statutes to sales of cigarettes on the Flathead Reservation by enrolled members of the Tribes is unconstitutional and a violation of tribal sovereignty under Article I, § 8, cl. 3 of the United States Constitution; the Treaty of Hellgate, 12 Stat. 975, July 16, 1855; the Organic Act for the Territory of Montana, 13 Stat. 85, May 26, 1864; and the Enabling Act of the State of Montana, 25 Stat. 676, February 22, 1889. Plaintiffs admit that Montana may, under P.L. 280 (67 Stat. 588, August 15, 1953), have assumed some jurisdiction over the Tribes, but contend that the assumed jurisdiction does not include the power to apply Montana's cigarette tax and dealer licensing statutes to cigarette sales on the Reservation by members of the Tribes.

Defendants in urging dismissal upon jurisdictional grounds contend that 28 U.S.C. 62 1341 prohibits this court from enjoining application of Montana's cigarette tax statutes. On the merits defendants contend that Montana has the power to require a member of the plaintiff Tribes "to precollect, for the state, its cigarette excise tax when such member sells cigarettes to a non-Indian within the exterior

4. On August 24, 1973 counsel for plaintiffs filed a "Suggestion of Death" of the plaintiff Joseph Anthony Wheeler, Jr. on August 11, 1973.

Subject Matter Jurisdiction

The defendants first argue that 28 U.S.C. § 1341 prohibits this court from enjoining enforcement of Montana's cigarette tax and dealer licensing statutes. Section 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

§ 1341 was enacted in 1937 (Act of August 21, 1937, 50 Stat. 738) as an amendment to § 24 of the Judicial Code. From its legislative history it is clear that Congress was concerned with correcting "the disparity between the rights of a citizen of a state, whose only means of litigating his disputed tax liabilities was a [state court] suit for refund for prepaid taxes, and those of foreign corporations and nonresidents, doing business within the state and incurring tax obligations, who could [because of diversity jurisdiction] obtain in the federal courts equitable relief[6] denied to citizens

5. As noted *infra*, defendants in effect have accepted the ruling of this court in its October 10 opinion that the State may not impose its excise tax upon sales to members of the Tribes residing on the Reservation.

6. "The existing practice of the Federal courts to entertain tax-injunction suits makes it possible for foreign corporations to withhold from a State and its governmental subdivisions taxes in such vast amounts and for such long periods as to disrupt State and county finances, and thus make it possible for such corporations to determine for themselves the amount of taxes they will pay." 81 Cong. Rec. 1416 (1937).

of the state."[7] *United States* v. *Livingston,* 179 F.Supp. 9, 11 (E.D. S.C. 1959), *aff'd,* 364 U.S. 281, 80 S.Ct. 1611, 4 L.Ed.2d 1719 (1960).

In spite of the seemingly unequivocal language of § 1341, the courts have recognized many exceptions in its application. Thus, in *Dept. of Employment* v. *United States,* 385 U.S. 355, 358, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966) the Court held that "§ 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." This exception is based upon the well established rule that legislative restrictions upon the exercise of remedial rights are not binding upon the sovereign unless clearly and expressly stated and upon the fact that a suit by the United States to assert its constitutional immunity from state taxation does not involve the evils that § 1341 was designed to correct or the interpretation or application of state laws. *Livingston, supra* at 11-12. See also, for example *United States* v. *Woodworth,* 170 F.2d 1019, 1020 (2 Cir. 1948) ("Congress did not intend [§ 1341] ***to apply to the United States which was not specifically named therein.") and *Board of Com'rs of Pawnee County, Okl.* v. *United States,* 139 F.2d 248, 250 (10 Cir. 1943), *cert. denied,* 321 U.S. 795, 64 S.Ct. 846, 88 L.Ed. 1084 (1944) ("[§ 1341] does not ***specifically mention the United States, and it is seriously questioned whether the restrictive provisions of [§ 1341] were intended to apply to suits brought by the United States.").

The exception stated in *Dept. of Employment* has been held to apply where the asserted tax immunity is based upon Congressional legislation, as well as the United States Consitution, and does not necessarily depend upon the existence of a proprietary interest in the Government. Thus, in *United States* v. *Arlington County, Commonwealth of Virginia,* 326 F.2d 929, 931 (4 Cir. 1964) it was held that § 1341 does not bar a federal court action brought by the United States on behalf of its servicemen to protect and enforce the

7. See S. Rep. No. 1035, 75th Cong., 1st Sess., pp. 2-3 (1937); H.R. Rep. No. 1503, 75th Cong., 1st Sess., pp. 2-3 (1937); 81 Cong. Rec. 1416-1417 (1937).

Government's statutory policies against state taxation of members of the Armed Forces. See also *Sullivan* v. *United States,* 395 U.S. 169, 170, n. 2, 89 S.Ct. 1648, 23 L.Ed.2d 182 (1969). Moreover, the exception applies even where, as here, the United States is not a party plaintiff, if the suit could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States. *Agua Caliente Bank of Mission Ind.* v. *County of Riverside,* 442 F.2d 1184, 1186 (9 Cir. 1971), *cert. denied,* 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972).[8]

While the exceptions to § 1341 have been expressed most often in terms of the Federal instrumentality doctrine we do not view the exceptions as limited to cases where this doctrine is clearly applicable. It seems clear from the decided cases and the legislative history of § 1341 that this section does not bar federal court jurisdiction in cases where immunity from state taxation is asserted on the basis of federal law with respect to persons or entities in which the United States has a real and significant interest. Accordingly, it is not essential for jurisdictional purposes that a threshold finding be made with respect to the complex issue of whether plaintiff Wheeler's business venture is an instrumentality of the Federal Government.[9]

There can be no doubt that the United States has a real

8. The court in *Agua* stated that "The reasons given in *United States* v. *Livingston, supra,* for exempting instrumentalities of the United States from the operation of 28 U.S.C. Section 1341 are no less cogent when the right to the exemption is asserted by one who properly could be a co-plaintiff with the United States."

9. In our opinion of October 10 we stated that this case falls within the Federal instrumentality doctrine. The Court of Appeals for the Ninth Circuit reached the same conclusion in *Jack Moses, Puyallup Trive* v. *George Kinnear,* F.2d (1973) in an opinion by Judge Jameson. Under *Mescalero Apache Tribe* v. *Jones,* 411, U.S. 145, 150-155, 93 S.Ct. 1297, 36 L.Ed.2d 114 (1973) and *McClanahan, supra* at 169-170 and n. 5, it now appears that the Federal instrumentality doctrine as a basis for immunity from state taxation with respect to Indians and Indian property is questionable. Compare, however, U.S. Dept. of the Interior, Federal Indian Law 845-6 (1958) a portion of which was quoted with approval in *McClanahan* at 170-171, as noted *infra.*

and significant interest in the Tribes and its members, who are wards of the Government with respect to which "it has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation* v. *United States,* 316 U.S. 286, 297, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942). This Governmental interest has manifested itself in the form of a federal legislative policy to protect reservation Indians from the application of state tax laws, see *McClanahan, supra* at 173-179, and it is upon the basis of this federal policy that plaintiffs claim they are exempt from the application of Montana's cigarette tax and dealer licensing statutes. Finally, it is clear that the United States would have standing to have brought this action, since as was said in *McCarty* v. *Hollis,* 120 F.2d 540, 542 (10 Cir. 1941), "The United States, in its own behalf and in its capacity as guardian of Indian tribes or individual Indians, may institute and maintain in the federal courts appropriate suits for the enforcement of the rights or the protection of the property of its Indian wards."[10]

We conclude that the United States could have brought this action in federal court, irrespective of § 1341, based upon the interest of the United States in protecting reservation Indians from state taxation and the fact that the asserted tax immunity is based solely upon federal law. Under *Agua, supra,* plaintiffs may take advantage of the right of the United States to maintain this action without regard to § 1341 if there is an independent basis for federal jurisdiction of their claims.

28 U.S.C. § 1362 provides:

> "1362. Indian tribes. — The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. (Oct. 10, 1966, P.L. 89-635, § 1, 80 Stat. 880.)"

In addition to providing a basis for federal court jurisdiction with respect to the Tribes, § 1362 supplies an additional reason for holding that § 1341 is not applicable here. It is clear from the legislative history of § 1362 that one of the purposes of the legislation was to permit Indian tribes to initiate litigation in federal court in those cases where the United States as guardian and trustee could have invoked federal jurisdiction.[11] Since § 1341 would not bar an action in federal court by the United States, it is not a bar to this action in view of the clear Congressional intent to allow tribes the same access to federal courts as is enjoyed by the United States as trustee and guardian.

While § 1362 does not confer jurisdiction with respect to

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10. See also *Heckman* v. *United States,* 224 U.S. 413, 441, 32 S.Ct. 424, 56 L.Ed. 820 (1912) where the Court recognized the right of the United States to sue in federal court on the basis of "the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection."

11. The Report of the House Judiciary Committee (H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966) on S. 1356, which became the Act of October 10, 1966, reads in part:

> "The purpose of the proposed legislation is to provide that the district courts are to have original jurisdiction of *all* civil actions brought by Indian tribes or bands wherein the matter in controversy rises under the Constitution, laws, or treaties of the United States. (Emphasis added.)
>
> ***
>
> "The committee feels that there is another factor which is relevant in this situation and serves to emphasize the justification for enactment of this bill. The United States as trustee can initiate litigation involving issues identical to those which would be presented in cases brought under the new section. The enactment of this bill would provide for U.S. district court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of the Interior report, the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The federal forum is therefore appropriate for litigation involving such issues."

the individual plaintiffs, [12] we conclude that this jurisdiction is conferred by 28 U.S.C. § 1343(3) which provides in pertinent part:

> "1343. Civil rights and elective franchise. — The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
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> ***
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

Plaintiffs have alleged a violation of 42 U.S.C. § 1983, based upon alleged deprivations of rights secured under the Commerce Clause, the Hellgate Treaty, and the Montana Organic and Enabling Acts. Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Although § 1983 was enacted primarily to enforce the Fourteenth Amendment, *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 545, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), the Court held in *Lynch* that the phrase "rights, privileges, or immunities secured by the Constitution and laws" includes not only Fourteenth Amendment rights, but "*all* of the Constitution and laws of the United States," noting its interpretation of similar language with respect to 18 U.S.C. § 242 in *United States* v. *Price*, 383 U.S. 787, 797, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). 405 U.S. at 549, n. 16. We therefore have no difficulty in holding that plaintiffs' alleged violation of Commerce Clause rights is sufficient to state a claim under § 1983.

§ 1343(3) is the "jurisdictional counterpart" of § 1983, and it was held in *Lynch* that "Despite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343(3) provides jurisdiction and both sections are construed identically." 405 U.S. at 544, n. 7.[13]

We conclude that this court has subject matter jurisdiction over the plaintiffs' claims under 28 U.S.C. §§ 1343(3) and 1362, and that this jurisdiction is not defeated by 28 U.S.C. § 1341.

Sales of Cigarettes to Members of Tribes

In *McClanahan* v. *Arizona State Tax Comm'n, supra,* the Court held that the State of Arizona has no jurisdiction to impose a tax on the income of Navajo Indians residing on the Navajo Reservation, whose income is wholly derived from reservation sources. The Court quoted with approval "a leading text on Indian problems" as summarizing "the re-

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12. See *Quinault Tribe of Indians* v. *Gallagher,* 368 F.2d 648, 656 (9 Cir. 1966).

13. While it may be argued that the phrase "for equal rights of citizens or of all persons within the jurisdiction of the United States" modifies both "Constitution of the United States" and "Act of Congress," implicit in this holding in *Lynch* is the conclusion that the qualifying phrase applies only to "Act of Congress."

It may be noted also that a long line of cases held that § 1343(3) confers jurisdiction for violations of 42 U.S.C. § 1983 rights only as to deprivations of personal liberty, and not, as are involved here, monetary or proprietary rights. This question was also resolved in *Lynch,* the Court stating that "This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction. Today we expressly reject that distinction." (Footnotes omitted.) 405 U.S. at 542.

levant law: 'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.' U. S. Dept. of the Interior, Federal Indian Law 845 (158)***." *Id.* at 170-171.[14]

The Court

> "noted that Congress has now provided a method whereby States may assume jurisdiction over reservation Indians. Title 25 U.S.C. § 1322(a) grants the consent of the United States to States wishing to assume criminal and civil jurisdiction over reservation Indians, and 25 U.S.C. § 1324 confers upon the States the right to disregard enabling acts which limit their authority over such Indians. But the Act expressly provides that the State must act 'with the consent of the tribe occupying the particular Indian country,' 25 U.S.C. § 1322(a), and must 'appropriately [amend its] constitution or statutes.' 25 U.S.C. § 1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See *Kennerly* v. *District Court*, 400 U.S. 423 (1971)."[15] *Id.* at 177-178. (Footnotes omitted.)

Montana has not acted pursuant to 25 U.S.C. §§ 1322 and 1324 to assume jurisdiction over the Tribes, but did take action under their predecessor statute. Pursuant to P.L. 280, 67 Stat. 588, August 15, 1953, the State of Montana assumed complete criminal and limited civil jurisdiction over the Indians residing on the Flathead Reservation.[16] This assumption of jurisdiction raises two issues: (1) whether Montana's cigarette excise tax and dealer licensing tax are criminal in nature; and (2) whether, if not criminal, the power to license cigarette dealers and tax cigarettes has been assumed under the limited assumption of civil jurisdiction.

It is evident that the taxing statutes are civil revenue collecting provisions, even though they are subject to being enforced by criminal penalties. If the civil revenue collecting provisions are not applicable to plaintiffs in the first instance, then neither are their criminal enforcement provisions.

Montana's limited assumption of civil jurisdiction over the Flathead Reservation Indians includes only the following: compulsory school attendance; public welfare; domestic relations (except adoptions); mental health, insanity, care of the infirm, aged and afflicted; juvenile delinquency and youth rehabilitation; adoption proceedings (with the consent of the tribal court); abandoned, dependent, neglected, orphaned or abused children; and operation of motor vehi-

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14. The Court explained that this principle of Indian sovereignty did not provide a "definitive resolution" of the issues, but was "a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan, supra* at 172. The Court continued with a detailed analysis of the relevant treaty and statutory provisions, which are essentially the same as those involved in this case, and concluded that "When the relevant treaty and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant." *Id.* at 173.

15. In a footnote the Court stated that "We do not suggest that Arizona would necessarily be empowered to impose this tax had it followed the procedures outlined in 25 U.S.C. § 1322 *et seq*. Cf. 25 U.S.C. § 1322(b). That question is not presently before us, and we express no views on it." *Id.* at 178, n. 18.

16. Plaintiffs contest the validity of this Montana assumption of jurisdiction. However, we need not decide this issue here, and accordingly express no opinion on it. For the purpose of deciding this case we will assume that Montana's assumption of jurisdiction over the Flathead Reservation Indians is valid under P.L. 280.

cles upon the public streets, alleys, roads and highways.[17] Clearly, the power to impose cigarette and licensing taxes is not among the categories of assumed civil jurisdiction.

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In *Kennerly* v. *District Court,* 400 U.S. 423, 91 S.Ct. 480, 27 L.Ed.2d 507 (1971) the Court held that in the absence of compliance with 25 U.S.C. § 1322 the Montana courts may not exercise civil or criminal jurisdiction over Indians on the Blackfeet Reservation, where the situation with respect to allotment and settlement is essentially the same as on the Flathead Reservation. In so holding the Court expressly relied upon *Williams* v. *Lee,* 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), a landmark decision on Indian sovereignty involving an action against a Navajo Indian on a transaction arising on the Navajo Reservation. In turn, the Court in *McClanahan* relied on *Kennerly* in holding that the Arizona courts "can exercise neither civil nor criminal jurisdiction over reservation Indians." 411U.S. at 178.

In *McClanahan,* the Court, after noting that Indians are citizens, have the right to vote, use state courts, and receive some state services, continued:

"But it is nonetheless still true, as it was in the last

17. See §§ 83-801-806, R.C.M. 1947. Following receipt of Tribal Ordinance 40-A (Revised) of the Confederated Tribes, the Governor of Montana on October 8, 1965 accepted criminal and civil jurisdiction as expressed in that Ordinance. For a discussion of proceedings subsequent to this action see *Security State Bank* v. *Pierre,* 511 P.2d 325, 328 (Mont. 1973).

> century, that '[t]he relation of the Indian tribes living within the borders of the United States...[is] an anomalous one and of a complex character....They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided. *United States* v. Kagama, 118 U.S. at 381-382." 411 U.S. at 173.

In '2' footnote on the same page the Court observed:

> "The court below pointed out that Arizona was expending tax monies for education and welfare within the confines of the Navajo Reservation. See 14 Ariz. App., at 456-457, 484 P.2d, at 225-226. It should be noted, however, that the Federal Government defrays 80% of Arizona's ordinary social security payments to reservation Indians, see 25 U.S.C. § 639, and has authorized the expenditure of more than $88 million for rehabilitation programs for Navajos and Hopis living on reservations. See also 25 U.S.C. §§ 13, 309, 309a. Moreover, '[c]onferring rights and privileges of these Indians cannot affect their situation, which can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization.' *The Kansas Indians,* 5 Wall., at 757." *Id.* at n. 12.

The tax exemption does not apply to all Indians, but only to reservation Indians, and is based upon their status under their tribal organization, with respect to which the Court noted in *McClanahan:* "It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." 411 U.S. at 172.

As in Arizona, the State of Montana expends tax moneys for education, welfare and other services within the confines of all Indian reservations, including the Flathead Reserva-

tion. It is likewise true, however, in Montana, as in Arizona, that the Federal Government expends substantial sums for Indian health and education and numerous vocational and rehabilitation programs pursuant to 25 U.S.C. §§ 13, 309, 309a and 452 and 42 U.S.C. §§ 2001-2005.

We affirm the conclusion set forth in our opinion of October 10, 1973 that under *McClanahan* Montana may not impose its cigarette tax upon sales of cigarettes on the Flathead Reservation between members of the Tribes; nor may Montana require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer's license.[18]

Sales to Non-Indians on Reservation

While Montana may not impose its cigarette excise tax on members of the Tribes who purchase cigarettes from other members on the Flathead Reservation[19] or require a dealer's license tax from the member seller, a more difficult question is presented with respect to the sale of cigarettes to non-Indians. By express statutory provision the taxes are "conclusively presumed to be direct taxes on the retail consumer precollected for the purpose of convenience and facility only." Section 84-5606(1), R.C.M. 1947. When the tax is paid by the seller it is "considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user." *Id.* In other words, the seller pays the tax to the wholesaler and adds it to the purchase price of the cigarettes.

In a sale to a non-Indian without payment of the tax, it is

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18. Counsel for defendants recognize that *McClanahan* "would certainly appear to apply to the imposition of a tax by the state of Montana, department of revenue, against an Indian residing within the boundaries of an Indian reservation, on cigarettes purchased within the reservation."

19. For the reasons hereinafter set forth we conclude that the tax may not be imposed on sales to all Indians who are residents of the Flathead Reservation, whether or not they are members of the plaintiff Tribes.

the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption. It is of course recognized that the seller would have a competitive advantage over non-Indian sellers on the Reservation as well as both Indians and non-Indian sellers off the Reservation through selling cigarettes at a lower price.

Against this factual background we must determine whether the State of Montana is precluded from requiring a member of the Tribes to precollect the tax if he wishes to sell cigarettes to non-Indians on the Flathead Reservation. He is not of course obligated to sell to non-Indians. In other words, does the established principle of federal pre-emption in taxation and regulations of Indian trading extend to the sale of cigarettes to non-Indians under this factual situation?

In the leading case of *Warren Trading Post* v. *Arizona Tax Comm'n*, 380 U.S. 685, 691-692, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), the Court invalidated the imposition by the State of Arizona of a gross income tax on a non-Indian trader licensed by the Federal Government "with respect to sales made to reservation Indians on the reservation." The Court said in part:

> "We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner. And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." 380 U.S. at 690-691.

In *McClanahan, supra* at 165, the Court at the outset recognized the requirement "again to reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." In referring to *Warren Trading Post, supra,* the Court pointed out that the tax there held invalid was in part "because 'Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.' *Warren Trading Post Co.* v. *Arizona Tax Comm'n,* 380 U.S. 685, 690 (1965)." 411 U.S. at 170, n. 6. In holding that a state is precluded from imposing a tax on the income of reservation Indians wholly derived from reservation sources, the Court said in part:

> "Indeed, Congress' intent to maintain the tax exempt status of reservation Indians is especially clear in light of the Buck Act, 4 U.S.C. § 104 *et seq.*, which provides comprehensive federal guidance for state taxation of those living within federal areas. Section 106(a) of Title 1 U.S.C. grants to the States general authority to impose an income tax on residents of federal areas, but § 109 expressly provides that '[n]othing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' To be sure, the language of the statute itself does not make clear whether the reference to 'any Indian not otherwise taxed' was intended to apply to reservation Indians earning their income on the reservation. But the legislative history makes plain that this priviso was meant to except reservation Indians from coverage of the Buck Act, see S. Rep. No. 1625, 76th Cong., 3d Sess., 2, 4 (1940); 84 Cong. Rec. 10685, and this Court has so interpreted it." *Id.* at 176-177.

On the other hand, the Court also recognized in *McClanahan* that "the Indian sovereignty doctrine, with its

concomitant jurisdictional limit on the reach of state law" has not "remained static during the 141 years since *Worchester* (*Worcester* v. *Georgia,* 6 Pet. 515, 557 (1832)) was decided." *Id.* at 171. The Court noted that "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians," the Court continuing:

> "This line of cases was summarized in this Court's landmark decision in *Williams* v. *Lee,* 358 U.S. 217 (1959: 'Over the years this Court has modified [the *Worcester* principle] in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized....Thus, suits by Indians against outsiders in state courts have been sanctioned....And state courts have been allowed to try non-Indians who committed crimes against each other on a reservation....But if the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive....Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.' *Id.,* at 219-220 (footnote omitted)." *Id.* at 171-172.

In *Mescalero Apache Tribe* v. *Jones, supra,* the Court held that the State of New Mexico may impose a nondiscriminatory gross receipts tax on a ski resort operated by the Tribe on off reservation land leased from the Federal Government, even though the land itself was exempt from state taxation under § 5 of the Indian Reorganization Act, 25 U.S.C. § 465. The Court held further that § 465 barred a use tax imposed on personalty that the Tribe installed because it was "so intimately connected with the use of the land itself" as to be encompassed by the statutory exemption. 411 U.S. at 158.

Mescalero rejected the "Tribe's broad claims of tax immunity" based upon the "expansive version of the intergovernmental-immunity doctrine," *Id.* at 155, referring, *inter alia,* to *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U.S. 342, 69 S.Ct. 561, 93 L.Ed. 721 (1949)

"where the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them were — as a matter of constitutional law — automatically exempt from state taxation. Rather, the Court held that Congress has the power 'to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action' and that '[t]he question whether immunity shall be extended in situations like these is essentially legislative in character.' *Oklahoma Tax Comm'n* v. *Texas Co., supra,* at 365-366." *Id.* at 150.

Recognizing that the exemption of Indian lands from state taxation is not all inclusive, the Court said further:

"Absent a 'definitely expressed' exemption, an Indian's royalty income from Indian oil lands is subject to the federal income tax although the source of the income may be exempt from tax. *Choteau* v. *Burnet,* 283 U.S. 691, 696-697 (1931). The Court has also held that a State, as well as the Federal Government, may tax an Indian's pro rata share of income from a tribe's restricted mineral resources. *Leahy* v. *State Treasurer,* 297 U.S. 420 (1936). Lessees of otherwise exempt Indian lands are also subject to state taxation. *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U.S. 342 (1949)." *Id.* at 156-157.

The general rule with respect to the "domain of power of the Federal Government over Indian affairs, judicially marked out," was summarized in U.S. Dept. of the Interior, Federal Indian Law 504 (1958) in part as follows:

"Thus, without questioning the constitutional doctrine that States possess original and complete sovereignty over their own territories save insofar as such sovereignty is limited by the Federal Constitution, a sense of realism compels the conclusion that control of Indian affairs has been assumed under the Constitution, by the Federal Government and that State jurisdiction in any matters affecting Indians can be upheld only if one of two

conditions is met: either that Congress has expressly delegated to the State, or recognized in the State, some power of government respecting Indians; or that a question involving Indians involves non-Indians to a degree which calls into play the jurisdiction of a State government."

With reference to "Non-Indian Activities" the same text reads in part:

"We have already noted the general rule that the Indian country within a State ordinarily is not regarded as an area of exclusive Federal jurisdiction but is politically and governmentally a part of the State in which State laws apply to the extent that they do not conflict with Federal Indian law. The scope of State jurisdiction was indicated by the Supreme Court in *United States* v. *McGowan,* (302 U.S. 535, 58 S.Ct. 286, 82 L.Ed. 410 (1938)) as follows:

***Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony [or reservation], of such state laws as conflict with the federal enactments (p. 539).

So considered, the general jurisdiction of the State over non-Indians extends throughout the territorial limits of the State save as may be limited by Federal enactment. Thus, it has been held that murder of a non-Indian by non-Indian on an Indian reservation, in the absence of express Federal legislation to the contrary, is a matter of exclusive State jurisdiction. Likewise the validity of State taxation of personalty of a non-Indian within Indian country has been sustained."[20] (Footnotes omitted.) *Id.* at 513-514.

20. Citing *Thomas* v. *Gay,* 169 U.S. 264, 273, 18 S.Ct. 340, 42 L.Ed. 740 (1898) where the Court held valid a state tax on cattle owned by a non-Indian lessee on an Indian reservation, saying, "But it is obvious that a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians."

It is clear that the Supreme Court has not passed upon the question here presented. With respect to sales of cigarettes to non-Indians, the case does not involve a tax imposed upon the income of an Indian earned on an Indian reservation, or a property or use tax on reservation land or personalty owned by an Indian, or a sales tax imposed on an Indian on the reservation. On the other hand, the sales were of course made by a member of the Tribes on the Flathead Reservation. The case does not clearly come within the recognized exceptions to the principle of federal pre-emption in the taxation of Indians and regulation of Indian trading on an Indian reservation.

This issue was before the Supreme Court in *Tonasket* v. *Washington*, 411 U.S. 451, 93 S.Ct. 1941, 36 L.Ed.2d 385, but this case was remended to the Supreme Court of Washington on April 24, 1973 for "reconsideration in light of §§ 6 and 7 of c. 157, 1972 Extraordinary Session Laws of the State of Washington, and this Court's decision in *McClanahan* v. *Arizona State Tax Comm'n, ante*, p. 164." *Tonasket*, like this case, involves the sale of cigarettes to both Indians and non-Indians. In a brief filed for the United States as amicus curaie, at the request of the Court, the Solicitor General, relying in part on *Warren Trading Post, supra*, argued that the taxes were "invalid insofar as they apply to sales to Indians residing on the Reservation," but expressed no opinion on the claimed exemption on sales to non-Indians.[21]

We are not here concerned with a licensed trader establishing retail stores for the benefit of Indians residing on the

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21. In pointing out "certain considerations that may be of assistance to the Court," the brief said in part:

> "a. Ordinarily Indian traders are not required to distinguish between sales to Indians and sales to non-Indians. The trading posts are in Indian country and are under federal supervision as to all sales. It would be unwarranted administrative burden to require them to operate under a dual system of licensing and sales. Here the factual situation is peculiar because appellant's sales to non-Indians are a major part of his activity. And, apparently, a major part of those sales are of cigarettes — a product in no way connected with reservation production or manufacture."

reservation, as was the case in *Warren Trading Post*. It appears from Wheeler's affidavit that he leased two one-acre tracts of tribal trust land from the plaintiff Tribes, with the approval of the Bureau of Indian Affairs. He has used the tracts for "establishing two retail store trailers." Both stores are located on U.S. Highway 93. He claims that "every day [his] stores are closed" he misses sales and that the total profit he is "losing far exceeds $10,000." Two of the affidavits refer to the signs on the store — "Cigarettes for Sale — $2.99 a Carton."

It is clear that the collection of the tax by the Indian seller would impose no tax burden on the Indians residing on the Reservation; nor would it infringe in any way upon tribal self-government. It may reasonably be inferred that the stores were not established primarily for the benefit of Indian customers residing on the Reservation, but rather to sell cigarettes to prospective customers passing on the highway and others who come from neighboring communities to purchase cigarettes at a price substantially lower than the going price off the Reservation. The Indian seller profits from increased sales. The non-Indian purchasers avoid the payment of a tax legally imposed upon them.

We conclude that under these facts the Indian seller in selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit the State of Montana to require precollection of the tax imposed upon the non-Indians.

We are not persuaded by plaintiffs' argument that defendants have a remedy through enforcement against a non-Indian who may purchase or be in possession of cigarettes without the required stamp showing payment of the tax. We agree with defendants that this remedy would be costly and ineffective. More important, it would mean that the Indian seller of the cigarettes could aid and encourage non-Indians in disobeying the law and be immune from prosecution.

Defendants seek a clarification of the term "Non-Indian," contending that with respect to the sale of cigarettes on the Flathead Reservation anyone who is not an enrolled member of the plaintiff Tribes is a non-Indian. We do not agree. The cases and texts discussed *supra* refer generally to

reservation Indians or Indians residing on the reservation. We conclude that all Indians residing on the Flathead Reservation are exempt from the payment of the cigarette tax.[22]

While the Department of Revenue of the State of Montana has filed no responsive pleading, as noted *supra* the Attorney General of Montana and the Department have filed a supplemental memorandum on behalf of the Department as well as the defendant Moe. The memorandum does not dispute any of the facts herein set forth. The defendants reserve their right to appeal from the ruling that this court has jurisdiction; and the memorandum discusses only the question of whether "the Montana cigarette excise tax is valid with respect to the sale of cigarettes on the Flathead Reservation by a member of the tribe to a non-Indian."

The motion of the plaintiffs for summary judgment is granted to the extent that the court holds as a matter of law that (1) the cigarette excise tax imposed by the State of Montana is invalid with respect to the sale of cigarettes by a member of plaintiff Tribes on the Flathead Reservation to any Indian residing on the Reservation; and (2) the cigarette dealer's license tax imposed by the State of Montana is invalid with respect to a member of plaintiff Tribes selling cigarettes on the Reservation. In all other respects the motion is denied.

Plaintiffs will prepare, serve and lodge proposed judgment consistent with this order and opinion.

Done and dated May 9, 1974.

s/James R. Browning
United States Circuit Judge

s/William J. Jameson
United States District Judge

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22. We decline to rule on the application of the tax in sales to Indians who do not reside on the Flathead Reservation. The courts have recognized that different rules may apply "where Indians have left the reservation and become assimilated into the general community." *McClanahan, supra* at 171. Different factual situations might well be presented in attempting to define "Indians" and "non-Indians" with respect to sales to non-residents of the Reservation. The record before the court on the present motions does not permit this determination.

I certify that Judge Browning has authorized me to sign his name to the foregoing per curiam opinion.

s/William J. Jameson
United States District Judge

SMITH, District Judge (dissenting):

I am fully aware that the United States has a plenary power when dealing with Indians. I have no doubt that Congress may tax and spend in any manner it sees fit in discharge of the federal responsibility to Indians. Congress may not, however, in the exercise of any of its plenary powers violate the constitutional rights of individuals, and no more may it do so where the exercise of the power relates to Indians. To express the same thought somewhat differently, the state has no obligations to Indians except as the federal government may impose them, and I think that the federal government may not in its directions to the state impose unconstitutional burdens upon the people in the states. I believe it to be self-evident that if a non-Indian is required to pay a larger load of state and local taxes to provide services for the Indian who, because of his race, is exempt from those taxes, then the non-Indian has been subjected to a racial discrimination and deprived of equal protection of the laws. The cases dealing with the subject of Indians and state taxation have not explored this side of the coin. I think it must be explored before a conclusion can be reached in this case.

The Flathead Reservation was created by the Treaty of 1855, 12 Stat. 975. The Act of April 23, 1904, 33 Stat. 302, provided for allotments in severalty to members of the tribe and for the sale of the surplus unallotted agricultural lands. President Taft on May 22, 1909, proclaimed that the surplus unallotted land should be opened for settlement under the Homestead Laws, and on May 24, 1909, the Secretary of the Interior promulgated regulations for the settlement of such lands. As a result lands were allotted to individual Indians in severalty and lands were sold to non-Indians under the Homestead Laws. Some of the lands allotted to individual Indians passed into non-Indian ownership.

The reservation consists of approximately 1,250,000 acres, of which 615,418 acres is trust land. The total resident membership of the tribe is 19 percent of the population

within the boundaries of the reservation. The full-blood enrollment is 3.3 percent.[1]

Congress over the years provided for the establishment of the Flathead Irrigation Project. Acts of: April 30, 1908, 35 Stat. 83; May 29, 1908, 35 Stat. 448; March 3, 1909, 35 Stat. 795; April 4, 1910, 36 Stat. 277; April 12, 1910, 36 Stat. 296; August 9, 1912, 37 Stat. 265; August 24, 1912, 37 Stat. 526; and May 18; 1916, 39 Stat. 139. The Act of May 10, 1926, 44 Stat. 464, provided that irrigation districts created and operated under the state law should be utilized for the collection of moneys needed for the operation and maintenance of the project and the repayment to the United States of funds advanced for the construction of the Flathead Irrigation Project. An elaborate irrigation system was built and extensive power projects established to provide power for pumping and for domestic and commercial use on Indian and non-Indian lands on the Flathead Reservation. The Flathead Reservation is now a well-developed agricultural area.

Indians and non-Indians are randomly scattered over the whole of the cultivated portion of the reservation. Towns and villages have developed, occupied by non-Indians and Indians alike. In the towns, banks, businesses, and professions provide services to the Indians and non-Indians. There are no licensed Indian traders on the Flathead Reservation.

As the non-Indian settlers moved in, school districts were created. From the beginning these districts, supported by state and local taxes, operated integrated schools. Now a system of state highways and county roads, built and maintained by federal, state, and county moneys, serve the urban and rural residents of the reservation. Indians do vote and are eligible to participate fully in the state government at all levels. In 1935 the Tribe incorporated under the provisions of the Indian Reorganization Act, 25 U.S.C. § 461, et seq., (48 Stat. 984 (1934)) and in 1965 accepted the criminal jurisdiction of the state, pursuant to Pub. L. No.

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1. *See Security State Bank v. Pierre,* Mont. , 511 P.2d 325 (1973).

280, 67 Stat. 588 (1953), and R.C.M. 1947 §§ 83-801, et seq. *See State ex rel. McDonald v. District Court,* 159 Mont. 156, 496 P.2d 78 (1972). The jurisdiction of minor crimes is concurrently shared by the state and tribal courts. The case of *Kennerly v. District Court,* 400 U.S. 423 (1971), does deprive the Indian of the right to the use of the state courts in civil disputes with other Indians, but the State of Montana and the Counties of Lake, Saunders, and Flathead, except as limited by the federal government, offer to the Indians and the Indians do use a full measure of state and local government services. Until the decision in *Kennerly* the state courts did exercise jurisdiction over civil cases arising on the reservation involving Indians.[2]

In 1887 Congress enacted the General Allotment Act. 25 U.S.C. § 349, 24 Stat. 390. In Section 6 that Act provided:

> At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law....

There can be no question but that those Indians who did get fee patents became subject to the laws of the state, including its tax laws. No other possible meaning can be ascribed to the words "have the benefit of and be subject to the laws, both civil and criminal, of the State." Since fee patents did issue up until the enactment of the Indian Reorganization Act of 1934, 48 Stat. 984, there are Indians now on the reservation who were specifically made subject to

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2. The record does not reveal the history of the Flathead and Navajo Reservations as I state it, but I believe this recital is substantially true and could be developed at a hearing. However, I would (so that another Indian case be not decided in a factual vacuum), were the decision to turn on my view of the law, require the parties to develop the facts at an evidentiary hearing.

the civil laws of the state.[3] Whatever its present effect, the General Allotment Act did indicate a congressional intent that Indians, once they became competent (competence being measured by the issuance of the patent) to manage their own affairs, should be treated equally under the state law. In short, Congress did indicate that as rights were conferred under state law obligations were imposed.[4] The Flathead Reservation was settled under the General Allotment Act and the concept of the equality stated by it no doubt influenced the patterns of development on the reservation. The General Allotment Act has not been repealed, and the doctrine of equal rights stated in it has never been expressly repudiated although the Act is now inoperative because patents are not now issued and because citizenship is now granted to Indians without regard to patent issuance. Act of June 2, 1924, 43 Stat. 253. Since, however, many Indians were never affected by the provisions of the General Allotment Act, resort must be had to other sources to determine their status.

The Montana Enabling Act (Act of February 22, 1889, 25 Stat. 676), accepted by Ordinance No. 1 to the Montana Constitution, preserves in the United States the jurisdiction over lands until the Indian title has been extinguished. It does not refer to the rights or obligations of individual Indians except with respect to trust lands. The federal

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3. One wonders whether these Indians under the rules announced in the majority opinion are to be treated as non-Indians or as Indians. Must the fee-patent Indian pay to puff?

4. This result is consistent with a general policy that burdens are imposed when rights are extended. The Civil Rights Act of 1870, 42 U.S.C § 1981, provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by pains, penalties, taxes, licenses, and exactions of every kind, and to no other." It has been held that this section does not apply to Indians in their relationship to the tribe. *Spotted Eagle v. Blackfeet Tribe,* 301 F. Supp. 85 (D.Mont. 1969). The effect of 42 U.S.C. § 1981 has not been considered as to the Indians in relationship to the state.

statutes relating to state jurisdiction over Indians (25 U.S.C. §§ 1321 and 1322) are concerned with the criminal and civil jurisdiction of the states over offenses committed by or against Indians and civil causes of action to which Indians are parties. They do not speak of the obligations of individual Indians and they do not refer to the taxation of Indians except in this language:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States...25 U.S.C. §1321(b)

It is to be noted that the exemption from taxation is limited to "real or personal property...that is held in trust by the United States." The Indian Reorganization Act of 1934, 48 Stat. 984, in Section 19 provides for the self-government of the tribes, but it does not in any way purport to exempt any Indian or any Indian property from state taxation except as to lands held "in trust for the Indian tribes or individual Indians." Congress has been extremely careful over the years to preserve the tax-free status of trust lands and has never experienced any difficulty in finding explicit words to express the purpose. Had other tax exemptions been intended one wonders why the purpose to exempt never surfaced in explicit language. Congress is aware of state taxation and has in specific instances found plain language to express various Indian exemptions from various state taxes.

Were there no guides before me but the history of the Flathead Reservation and the Acts of Congress, I would not

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5. See 25 U.S.C.A. §: 564, 749, 798, 853, 898, 937, 955, 963; and 25 U.S.C.A. (pocket parts) §§: 565F, 589, 594, 609c-1, 610b, 645, 648, 662, 676b-1, 690, 788b, 881, 883c, 967c, 1013, 1036, 1073, 1087, 1104, 1120, 1134, 1146, 1154, 1165, 1171, 1185, 1194, 1204, 1211, 1225, 1234, 1246, 1252 (Flathead), 1264, 1273, 1282, 1296, 1300a-3, 1300b-4, 1300c-4, 1300d-8, 1300e-6.

imply state tax exemptions except as to Indian trust lands.[6]

A more fundamental consideration persuades me that we should not imply a tax exemption in this case. Were non-Japanese residents of a state forced to pay taxes to provide state services for the Japanese residents, who were exempt from taxation solely because of their race, then the non-Japanese would be bearing an unequal burden. Were Congress by statute to direct a state to exempt all Japanese from state taxation I think that Congress would be requiring the state to violate the equal protection clause of the 14th amendment and would itself violate the equal protection concept embraced in the fifth amendment.[7] Although a taxing authority has an almost unlimited power to classify, I apprehend that race alone could never be a valid basis for classification.

The Japanese is, of course, entitled to a full measure of

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6. The rule that tax exemptions are not to be granted by implication has been said to apply to Indians:

> "This Court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co. v. Helvering*, 307 U.S. 57, 60. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, 'If the exemption had been intended, it would doubtless have been expressed.' *Cherokee Tobacco*, 11 Wall. 616, 620. In holding the income tax applicable to Indians, the Court said, 'The terms of the 1928 Revenue Act are very broad, and nothing there indicates that Indians are to be excepted....If exemption exists it must derive plainly from agreements with the Creeks or some Act of Congress dealing with their affairs.' *Superintendent v. Commissioner, supra*, 420. If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusions cannot rest on dubious inferences." — *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606-607 (1943)

Squire v. Capoeman, 351 U.S. 1 (1956), may point to, although it does not express, a different rule where the taxing power of Congress comes into conflict with the interest of a ward 411 U.S. 164 (1973), does not mention the Oklahoma Tax Commission case in this connection but certainly does not follow the rule of construction stated in it.

7. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

state services by virtue of the 14th amendment. The analogy to the Japanese fails if the Flathead Indian is not entitled to state services — if the State of Montana can refuse to admit Indian children to its schools, Indian young people to its colleges, and refuse to extend welfare benefits to the Indian poor and aged. In that event no unequal burden is placed upon the non-Indian and the equal protection problem disappears. The problem is not what could Congress have done but what did it do. Did it, with respect to the Flathead Indians, so remove them from jurisdiction of the state that they are not persons "within its jurisdiction" for 14th amendment purposes? An argument to that effect could be made, based upon 25 U.S.C. §§ 1321 and 1322, together with language from the decisions in the cases of *McClanahan v. Arizona Tax Commission, supra* note 6; *Williams v. Lee,* 358 U.S. 217 (1959); *Warren Trading Post Co. v. Arizona Tax Commission,* 380 U.S. 685 (1965); and *Kennerly v. District Court, supra.*

I am unwilling to conclude that Congress, which in its only explicit treatment of the subject (the General Allotment Act) evidenced an express intent to place the benefits and burdens of state government on non-Indians and Indians alike, has by some kind of a negative implication in other statutes removed the Flathead Indians from the protection of the 14th amendment. I am particularly unwilling to conclude this in light of a history which indicates an extension of state services by the state and acceptance of state services by the Indians and until very recently an acceptance of state tax burdens by the Indians.

If, as I view it, the Flathead Indian is entitled to a full measure of Montana state and local government services, then I think the federal government may not, without invading the constitutional rights of non-Indian taxpayers, exempt Indians from the burdens of state taxation. Stated differently, Congress has the power (either directly by a civil rights act, or via the 14th amendment by placing the Indian within the jurisdiction of the state) to require that Indians be not deprived of the equal protection of state laws. But in my opinion the exercise of both of these powers at the same time would deprive non-Indians of equal protection. If that is so,

then I cannot infer the exercise of both powers and, given a choice of inference, I would for the reasons stated infer that the Flathead Indians are sufficiently within the jurisdiction of the State of Montana to be entitled to state services and, except as to trust lands, subject to state taxation.

The result which I would reach is not in my opinion foreclosed by the present opinions of the Supreme Court. That Court has not passed upon these problems as they are affected by the General Allotment Act or the reservations which developed under it. The opinions of the Supreme Court in this area relate to the Navajo Reservation and they are predicated upon a wholly different set of facts than is present here. Different facts justify different rules, even where the subject matter is Indians or Indian reservations.[8] Allotments in severalty were not made on the Navajo Reservation and the provisions of the General Allotment Act never applied to the Indians on that reservation. There are no non-Indian ownerships within the exterior boundaries of the Navajo Reservation. The Navajos live to themselves — largely apart from the non-Indian community. The non-Indians on the reservation, such as Indian traders and government officials, are the invitees of the tribe or the federal government. What was said in *Warren Trading Post v. Arizona Tax Commission, supra,* 690:

> Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations the Federal

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8. "The underlying principles on which these decisions are based do not fit the situation of the Oklahoma Indians. Although there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy as in *Worcester v. Georgia, supra;* and, unlike the Indians involved in *The Kansas Indians* case, *supra,* they are actually citizens of the State with little to distinguish them from all other citizens except for their limited property resistrictions and their tax exemptions." *Oklahoma Tax Comm'n v. United States, supra* note 6, at 603.

> Government has provided for roads, education and other services needed by the Indians...

and further at 691:

> ...And since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax...

cannot be said of the Flathead Reservation

The language in *McClanahan v. Arizona Tax Commission, supra,* 173:

> ...When the relevant treaty and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by attempting to tax appellant...

could not be applied to the Flathead Reservation. There was no tradition of sovereignty on that reservation until 1934.[9] Major crimes were punished at the federal level and until at least 1935 minor crimes at the state level. There were no tribal courts until after the enactment of the Indian Reorganization Act in 1934. State courts did exercise jurisdiction over civil cases until the decision in *Kennerly v. District Court, supra.* The whole body of state civil law was thought to be applicable to non-Indians and Indians alike. The state irrigation district laws were specifically utilized in connection with the irrigation of reservation lands.

What was further said in *McClanahan,* at 175:

> Moreover, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation...

cannot be said of the Flathead Reservation because at least until 1934 Indians were specifically made subject to state jurisdiction when they received fee patents, as many of them

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9. As reflecting upon the tradition of sovereignty it would be interesting to know what, if any, taxes have been levied by the tribe and what, if any, governmental services have been provided by such taxes.

did.

To paraphrase Mr. Justice Black in *Oklahoma Tax Commission v. United States, supra* note 6, at 603, the underlying principles on which the Navajo decisions are based do not fit the situation of the Flathead Indians.

s/Russell E. Smith
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA ("TRIBES"); HAROLD W. MITCHELL, JR., CHAIRMAN OF THE TRIBAL COUNCIL, AND A MEMBER OF THE TRIBES, JOSEPH ANTHONY WHEELER, JR., A MEMBER OF THE TRIBES, AND DOROTHY E. WHEELER CLINKENBEARD, A MEMBER OF THE TRIBES, EACH ON BEHALF OF HIMSELF AND HERSELF AND ALL OTHER MEMBERS OF THE TRIBES,

Plaintiffs,

v.

JOHN C. MOE, INDIVIDUALLY AND IN OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF MISSOULA, MONTANA, AND WILLIAM A. PHILLIPS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF LAKE, MONTANA,

Defendants.

Civil No. 2145

MEMORANDUM OPINION

Before: BROWNING, Circuit Judge, and SMITH and JAMESON, District Judges

PER CURIAM:

This is an action by the Confederated Salish and Kootenai Tribes of the Flathead Reservation and three enrolled members of the Tribes, suing on behalf of themselves and all other members of the Tribes, against John C. Moe and William A. Phillips, Sheriffs of Missoula and Lake Counties, respectively, "seeking to declare unconstitutional the enforcement against plaintiffs of Title 84, *Rev. Mont. Code* §§ 5606 *et seq.*, the Montana cigarette sales tax and dealer licensing statutes" and for an injunction restraining the enforcement of the statutes and any regulations promulgated pursuant thereto.[1] A three-judge court was convened pursuant to 28 S.S.C. § 2281.

Defendants filed motions to dismiss. The motion of the defendant Phillips included a motion to "join the State of Montana by and through its taxing authority, namely the Department of Revenue, as a necessary party to this action".[2] Plaintiff filed a motion for summary judgment with supporting affidavits.[3] All motions were set for hearing on September 15, 1972.

At the hearing on September 15, 1972 the court and counsel agreed that two cases then pending in the Supreme Court of the United States, i.e., *McClanahan* v. *Arizona State Tax Commission* and *Tonasket* v. *The State of Washington* might have some bearing upon the disposition of this case and that further proceedings should be deferred until those cases were decided. *McClanahan* was decided on March 27, 1973, and a per curiam was entered in *Tonasket* on April 24, 1973 reading:

> "The judgment of the Supreme Court of Washington is vacated, and the case is remanded to that Court for reconsideration in light of §§ 6 and 7 of c. 157, 1972 Session Laws of the State of Washington, and this Court's decision in *McClanahan* v. *Arizona State Tax Comm'n*, No. 71-834 (March 27, 1973)."

On April 30, 1972 an order was entered granting the parties until June 1, 1973 within which to file briefs considering the effect of the decisions in *McClanahan* and *Tonasket*. Briefs were filed by counsel for plaintiffs and by the Attorney General of Montana for the defendants. The parties agree that there is no reason to defer further the proceedings in this case until the Supreme Court of Washington reconsiders its decision in *Tonasket*.

Factual Background

It appears from the allegations in the complaint and the affidavits filed in support of plaintiffs' motion for summary judgment that the plaintiff Wheeler,[4] a member of the Tribes, leased from the Tribes small tracts of trust land

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1. Section 84-5606, R.C.M. 1947, imposes an excise tax upon cigarettes sold or purchased in the State of Montana. Subsection (1) reads:

> "All taxes paid pursuant to the provisions of this section shall be conclusively presumed to be direct taxes on the retail consumer precollected for the purpose of convenience and facility only. When the tax is paid by any other person such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Any person selling cigarettes at retail shall state or separately display in the licensed premises a notice of the tax included in the selling price and charged or payable pursuant to this section. The provisions of this subdivision shall in no way affect the method of collection of such tax as provided by this section."

Section 84-5606.5 imposes a retailer's license tax, and a "retailer" is defined by § 84-5606.2(j) as "any person other than a wholesaler, who is engaged in the business of selling cigarettes at retail."

2. Plaintiffs have taken no action to add the Department of Revenue as a party defendant, although, as noted *infra*, defendants contend that inasmuch as the State of Montana is not a party, the question of the constitutionality of the cigarette sales and license taxes is not properly before the court.

3. No counter affidavits have been filed, but the defendant Moe filed a motion to hold plaintiffs' motion for summary judgment in obeyance pending determination of defendants' motion to dismiss and whether this is an appropriate case for a three-judge court under 28 U.S.C § 2281.

4. On August 24, 1973 counsel for plaintiffs filed a "Suggestion of Death" of the plaintiff Joseph Anthony Wheeler, Jr. on August 11, 1973.

within the Flathead Reservation. On these tracts, one of which is in Missoula County, the other in Lake County, Wheeler, who did not have a state license to sell cigarettes, established retail stores which sold cigarettes to which state tax stamps were not affixed.

On April 13, 1972 Wheeler was arrested by deputies of the Missoula County Sheriff's Office for selling cigarettes on the Missoula County tract without a state license and for not having a state cigarette tax stamp affixed to each package sold. Subsequently, sheriff's deputies confiscated approximately 1,350 cartons of Wheeler's cigarettes. At the time of both the arrest and confiscation the deputies tore down signs on the door of Wheeler's store advertising cigarettes for sale.

Also on April 13, 1972 officials from the Lake County Sheriff's Office converged on Wheeler's other store, located on the Lake County Tract. The storekeeper, plaintiff Clinkenbeard, also a member of the Tribes, was arrested for the same offenses as was Wheeler. Cigarettes, however, were not confiscated during this raid.

Contentions of Parties

Plaintiffs contend that the application of Montana's cigarette tax and dealer licensing statutes to sales of cigarettes on the Flathead Reservation by enrolled members of the Tribes is unconstitutional and a violation of tribal sovereignty under Article I, § 8, cl. 3 of the United States Constitution; the Treaty of Hellgate, 12 Stat. 975, July 16, 1855; the Organic Act for the Territory of Montana, 13 Stat. 85, May 26, 1864; and the Enabling Act of the State of Montana, 25 Stat. 676, February 22, 1889. Plaintiffs admit that Montana may, under P.L. 280 (67 Stat. 588, August 15, 1953), have assumed some jurisdiction over the Tribes, but contend that the assumed jurisdiction does not include the power to apply Montana's cigarette tax and dealer licensing statutes to cigarette sales on the Reservation by members of the Tribes.

Defendants in urging dismissal contend that this court lacks jurisdiction. They argue that (1) 28 U.S.C. § 1341 prohibits this court from enjoining application of Montana's

cigarette tax statutes; and (2) in any event, this court should abstain from exercising its jurisdiction. On the merits defendants contend that Montana has the power to apply its cigarette tax and dealer licensing statutes to plaintiffs, and that the Montana tax is not one imposed on the individual plaintiffs Wheeler and Clinkenbeard.

Subject Matter Jurisdiction

The defendants first argue that 28 U.S.C. § 1341 prohibits this court from enjoining enforcement of Montana's cigarette tax and dealer licensing statutes. Section 1341 provides: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

At first glance it would appear that § 1341 bars this action. There are exceptions to § 1341, however, and one of them is applicable here.

The Supreme Court has said that "§ 1341 does not act as a restriction upon suits by the United States to protect itself and its instrumentalities from unconstitutional state exactions." *Department of Employment* v. *United States*, 385 U.S. 355, 358, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966). This rule, commonly known as the federal instrumentality doctrine, has its clearest application in cases where the United States is both a plaintiff and "has in fact a proprietary interest." *United States* v. *Arlington County, Commonwealth of Virginia*, 326 F.2d 929, 931 (4 Cur. 1964).[5] However, the instrumentality doctrine has also been held applicable where the Government sues on behalf of a private party in order to protect and enforce its policies with respect to those in whom the United States has a special interest, though

5. For example, when the United States is seeking to enjoin state taxation of realty which it holds in trust for the use of Indians or personalty which is traceable to property given the Indians by the Government. *United States* v. *Rickert*, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903); *United States* v. *Pearson*, 231 Fed. 270 (D.S.D. 1916).

perhaps not a proprietary one.[6] The doctrine also applies where the United States is not a party plaintiff, if the suit could have been brought by the United States and is in fact brought by parties who could properly be co-plaintiffs with the United States. *Agua Caliente Band of Mission Ind.* v *County of Riverside,* 442 F.2d 1184, 1186, (9 cir. 1971), *cert. denied,* 405 U.S. 933 (1972).

There can be no doubt that the United States has a special interest in its ward Indians, with respect to which the Government "has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation* v. *United States,* 316 U.S. 286, 297, 62 S.Ct. 1049, 86 L.Ed. 1480 (1942). This "special interest" has manifested itself in the form of a federal policy to protect Indians and Indian property from state taxation. See U.S. Dept. of the Interior, Federal Indian Law 845-850 (1958).

28 U.S.C. § 1362 provides:

> "1362. Indian tribes. — The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. (Oct. 10, 1966, P.L. 89-635 § 1, 80 Stat. 880.)"

It is clear from the legislative history of § 1362 that one of the purposes of the legislation was to permit the Tribes to initiate litigation involving issues which could have been instituted by the United States as trustee. The Report of the House Judiciary Committee (H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966)) on S. 1356 which became the Act of October 10, 1966, reads in part:

> "The committee feels that there is another factor which is relevant in this situation and serves to emphasize the justification for enactment of this bill. The United States as trustee can initiate litigation involving issues identical to those which would be present in cases brought under the new section. The enactment of this bill would provide for U.S. district court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action. As is observed in the Department of Interior report, the tribes would then have access to the Federal courts through their own attorneys. It can therefore be seen that the bill provides the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys. There is a large body of Federal law which states the relationship, obligations and duties which exists between the United States and the Indian tribes. The federal forum is therefore appropriate for litigation involving such issues."

While § 1362 does not confer jurisdiction with respect to the individual plaintiffs,[7] we conclude that this jurisdiction is conferred by 28 U.S.C. § 1343(3) which provides in pertinent part:

> "1343. Civil rights and elective franchise. — The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege of immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

Plaintiffs have alleged a violation of 42 U.S.C § 1983, based upon alleged deprivations of rights secured under the

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6. See *Arlington County, supra,* and *United States* v. *Sullivan,* 270 F.Supp. 236 (D. Conn. 1967), which were suits by the United States on behalf of servicemen to protect the Government's statutory policies against state taxation with respect to members of the Armed Forces.

7. See *Quinalt Tribe of Indians* v. *Gallagher,* 368 F.2d 648, 656 (9 Cir. 1966).

Commerce Clause, the Hellgate Treaty, and the Montana Organic and Enabling Acts. Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Although § 1983 was enacted primarily to enforce the Fourteenth Amendment, *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 545, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), the Court held in *Lynch* that the phrase "rights, privileges, or immunities secured by the Constitution and laws" includes not only Fourteenth Amendment rights, but "all of the Constitution and laws of the United States," noting its interpretation of similar language with respect to 18 U.S.C. § 242 in *United States* v *Price,* 383 U.S. 787, 797, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). 405 U.S. at 549, n. 16. We therefore have no difficulty in holding that plaintiffs' alleged violation of Commerce Clause rights is sufficient to state a claim under § 1983.

§ 1343(3) is the "jurisdictional counterpart" of § 1983, and it was held in *Lynch* that "Despite the different wording of the substantive and jurisdictional provisions, when the § 1983 claim alleges constitutional violations, § 1343(3) provides jurisdiction and both sections are construed identically." 405 U.S. at 544, n. 7.[8]

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8. While it may be argued that the phrase "for equal rights of citizens or of all persons within the jurisdiction of the United States" modifies both "Constitution of the United States" and "Act of Congress," implicit in this holding in *Lynch* is the conclusion that the qualifying phrase applies only to "Act of Congress."

It may be noted also that a long line of cases held that § 1343(3) confers jurisdiction for violations of 42 U.S.C. § 1983 rights only as to deprivations of personal liberty, and not, as are involved here, monetary or proprietary rights. This question was also resolved in *Lynch,* the Court stating that

We conclude that this court has subject matterjurisdiction over the plaintiffs' claims, under 28 U.S.C. §§ 1343(3) and 1362, and that this jurisdiction is not defeated by 28 U.S.C. § 1341, since this case falls within the federal instrumentality doctrine's exception to the jurisdictional bar of § 1341.

Effect of McClanahan v. Arizona Tax Commission

In *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), the Court held that the State of Arizona has no jurisdiction to impose a tax on the income of Navajo Indians residing on the Navajo Reservation, whose income is wholly derived from reservation sources.[9] The Court quoted with approval "a leading text on Indian problems" as summarizing "the relevant law: 'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.' U.S. Dept. of the Interior, Federal Indian Law 845 (1958) ***." *Id.* at 170-171.

The Court

> "noted that Congress has now provided a method whereby States may assume jurisdiction over reservation Indians. Title 25 U.S.C. § 1322(a) grants the consent of the United States to States wishing to assume criminal and civil jurisdiction over reservation Indians, and 25 U.S.C. § 1324 confers upon the States the right to disregard enabling acts which limit their authority over such

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"This Court has never adopted the distinction between personal liberties and proprietary rights as a guide to the contours of § 1343(3) jurisdiction. Today we expressly reject that distinction." (Footnotes omitted.) 405 U.S. at 542.

9. The constitutional, statutory, and treaty provisions upon which plaintiffs rely are essentially the same as those involved in *McClanahan.*

> Indians. But the Act expressly provides that the State must act 'with the consent of the tribe occupying the particular Indian country,' 25 U.S.C. § 1322(a), and must 'appropriately [amend its] constitution or statutes.' 25 U.S.C. § 1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. But we cannot believe that Congress would have required the consent of the Indians affected and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the States were free to accomplish the same goal unilaterally by simple legislative enactment. See *Kennerly* v. *District Court,* 400 U.S. 423 (1971."[10] *Id.* at 177-178. (Footnotes omitted.)

Montana, it should be noted, has not acted pursuant to 25 U.S.C. §§ 1322-1324 to assume jurisdiction over the Tribes.

Montana did, however, take action with respect to the Tribes under the predecessor of 25 U.S.C. §§ 1322-1324. Pursuant to P.L. 280, 67 Stat. 588, August 15, 1953, the State of Montana assumed complete criminal and limited civil jurisdiction over the Indians residing on the Flathead Reservation. [11] This assumption of jurisdiction raises two issues: (1) whether Montana's cigarette excise tax and dealer licensing tax are criminal in nature; and (2) whether, if not criminal, the power to license cigarette dealers and tax cigarettes has been assumed under the limited assumption of civil jurisdiction.

It is evident that the taxing statutes are civil revenue collecting provisions, even though they are subject to being

10. In a footnote the Court stated that "We do not suggest that Arizona would necessarily be empowered to impose this tax had it followed the procedures outlined in 25 U.S.C. § 1322 *et seq.* Cf. 25 U.S.C. § 1322(b). That question is not presently before us, and we express no views on it." *Id.* at 178, n. 18.

11. Plaintiffs contest the validity of this Montana assumption of jurisdiction. However, we need not decide this issue here, and accordingly express no opinion on it. For the purpose of deciding this case we will assume that Montana's assumption of jurisdiction over the Flathead Reservation Indians is valid under P.L. 280.

enforced by criminal penalties. If the civil revenue collecting provisions are not applicable to plaintiffs in the first instance, then neither are their criminal enforcement provisions.

Montana's limited assumption of civil jurisdiction over the Flathead Reservation Indians includes only the following: compulsory school attendance; public welfare; domestic relations (except adoptions); mental health, insanity, care of the infirm, aged, and afflicted; juvenile delinquency and youth rehabilitation; adoption proceedings (with the consent of the tribal court); abandoned, dependent, neglected, orphaned, or abused children; and operation of motor vehicles upon the public streets, alleys, roads and highways.[12] Clearly, the power to impose cigarette and licensing taxes is not among the categories of assumed civil jurisdiction.

Without conceding that this court has jurisdiction, counsel for defendants recognize that *McClanahan* "would certainly appear to apply to the imposition of a tax by the state of Montana, department of revenue, against an Indian residing within the boundaries of an Indian reservation, on cigarettes purchased within the reservation." They argue, however, that the Department of Revenue is not a party to this action. Their memorandum continues:

> "There is no indication whether the state department of revenue is imposing a tax on cigarettes purchased by Indian residents of the Flathead Reservation, or whether the state will continue to do so. There appears to be no reason why the state could not provide for an exemption from the cigarette tax to Indian residents of the Flathead Indian Reservation. Still that matter is not before this court. All that is before this court is whether the defendants Moe and Phillips either violated some civil right of plaintiffs Wheeler or Clinkenbeard through the enforcement of Montana's crim-

12. See §§ 83-801-806, R.C.M. 1947. Following receipt of Tribal Ordinance 40-A (Revised) of the Confederated Tribes, the Governor of Montana on October 8, 1965 accepted criminal and civil jurisdiction as expressed in that ordinance.

inal laws or violated the sovereignty of the tribes, sovereignty being specifically rejected as a basis for jurisdiction in *McClanahan,* supra."

Plaintiffs contend in their supplemental memorandum that "unless Montana assumed jurisdiction to tax pursuant to congressional authorization, it has no jurisdiction over the sale of cigarettes by a tribal member within the boundaries of the reservation, whether he sells to members or non-members."

It would seem that the sole question on which there is any substantial dispute on the merits is whether the State of Montana may require an enrolled member of the Tribes who sells cigarettes on the Flathead Reservation to a non-Indian to "precollect" the excise tax pursuant to § 84-5606(1), R.C.M. 1947.[13] In our opinion, it is clear that under *McClanahan* Montana may not impose its cigarette tax upon sales of cigarettes on the Flathead Reservation between members of the Tribes; nor may Montana require a member of the Tribes who sells cigarettes on the Flathead Reservation to possess its cigarette dealer's license.

Addition of State Department of Revenue as Party Defendant

Other procedural questions are raised by defendants which might well be obviated by the addition of the Department of Revenue as a party defendant.

Abstention

Defendants contend that this court should abstain from exercising jurisdiction on the ground that plaintiffs' request for injunctive and declaratory relief constitutes an unjustifiable attempt to restrain the future enforcement of state criminal laws. They argue, with some justification, that by naming as defendants only two county sheriffs, plaintiffs are directing their case only against the criminal enforcement sanctions of the cigarette excise and dealer licensing statutes rather than the initial imposition of these taxes. This presents an interesting and complex question, but we see no reason to consider it if the Department of Revenue is added as a party defendant.

13. It may be noted that the Brief for the United States of Amicus Curiae filed by the Solicitor General in *Tonasket* contended that the Taxes of the State of Washington at issue in that case were invalid insofar as they applied to sales to Indians residing on the Reservation. Appellant contended, as do plaintiffs here, that the sales to non-Indians were also exempt. The Solicitor General expressed no view on that issue, although he did point out certain considerations which might be of assistance to the Court.

Jurisdiction of Three-Judge Court

Defendants question the propriety of a three-judge court. The jurisdiction of a three-judge district court is governed by 28 U.S.C. § 2281. The jurisdictional requirements under this section are that "a state statute or administrative order must be challenged, a state officer must be a party defendant, injunctive relief must be sought, and it must be claimed that the statute or order is contrary to the Constitution of the United States." Wright, Federal Courts § 50 (2d Ed. 1970).

It may well be that a county sheriff is not a state official within the meaning of § 2281. This question may easily be obviated by adding the Department of Revenue as a defendant. If that is done, the requirements of § 2281 would in our opinion be clearly satisfied.[14] See, e.g., *Query* v. *United States,* 316 U.S. 486, 62 S.Ct. 1122, 86 L.Ed. 1616 (1942); and *Florida Lime and Avocado Growers, Incorporated* v. *Jacobson,* 362 U.S. 73, 80 S.Ct. 568, 4 L.Ed.2d 568 (1960).[15]

14. In the event we should be mistaken in holding that the three-judge court has jurisdiction, if the judge who requested the designation individually arrives at the court's conclusion, the losing parties could protect themselves by timely appeals to both the Supreme Court and the Court of Appeals. See *Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 299 F.Supp. 117, 129 (S.D. N.Y. 1969).

15. Moreover, we are satisfied that a substantial claim of unconstitutionality is raised by plaintiffs' complaint. As the Supreme Court said in *Ex parte Poresky,* 290 U.S. 30, 32, 54 S.Ct. 3, 78 L.Ed. 152, (1933), "The existence of a substantial question of constitutionality claims "are constitutionally insubstantial only if the prior decisions inescapably render

We have concluded that before ruling on any of the pending motions we should invite counsel to file supplemental memoranda in the light of this opinion with respect to: (1) the addition of the Department of Revenue as a party defendant; and (2) whether the Montana cigarette excise tax is invalid with respect to the sale of cigarettes on the Flathead Reservation by a member of the Tribes to a non-Indian.

IT IS ORDERED:

The parties are granted to and including November 8 within which to file supplemental briefs.

DONE AND DATED October 10, 1973.

James R. Browning
United States Circuit Judge

Russell E. Smith
United States District Judge

William J. Jameson
United States District Judge

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the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281." *Goosby* v. *Osser*, 109 U.S. 512, 518, 93 S.Ct. 854, 35 L.Ed.2d 36 (1973).

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

FILED
March 19, 1975
John E. Pederson, Clerk
By: Dora Lou Sevener,
Deputy Clerk

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA ("TRIBES"); HAROLD W. MITCHELL, JR., CHAIRMAN OF THE TRIBAL COUNCIL, AND A MEMBER OF THE TRIBES, JOSEPH ANTHONY WHEELER, JR., A MEMBER OF THE TRIBES, AND DOROTHY E. WHEELER CLINKENBEARD, A MEMBER OF THE TRIBES, EACH ON BEHALF OF HIMSELF AND HERSELF AND ALL OTHER MEMBERS OF THE TRIBES,

Plaintiffs,

v.

JOHN C. MOE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF MISSOULA, MONTANA, WILLIAM A. PHILLIPS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF LAKE, MONTANA, THE DEPARTMENT OF REVENUE, STATE OF MONTANA, AND KEITH L.

Civil No. 2145

JUDGMENT

COLBO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MONTANA,

Defendants.

This cause came before the Court on plaintiffs' motion for summary judgment, together with supporting affidavits; defendants' motion to dismiss the case as to themselves, together with a motion by defendant Phillips to join the Department of Revenue of the State of Montana as a necessary party defendant; and the motion of certain principal defendants for summary judgment following extensive discovery permitted by Order of the Court dated July 15, 1974, reopening the case for development of additional facts and submission of additional briefs. Pursuant to 28 U.S.C. § 2281 and to Rules 12 and 56, Federal Rules of Civil Procedure, a three-judge court was convened, consisting of the Honorable James R. Browning, Circuit Judge; Russell E. Smith, Chief District Judge; and William J. Jameson, District Judge, and the issues have been fully heard and all the briefs considered and two orders and opinions having been duly rendered and filed on May 10, 1974, and on February 4, 1975;

IT IS ORDERED, ADJUDGED AND DECREED:

1. That to the extent stated in the following paragraphs, plaintiffs' motion for summary judgment is granted and defendant State of Montana and its agents and officials are enjoined from imposing and collecting certain cigarette taxes:

(a) The Court has jurisdiction to determine this cause with respect to plaintiff Tribes pursuant to 28 U.S.C. § 1362, and with respect to individual plaintiffs pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, which jurisdiction is not defeated by 28 U.S.C. § 1341;

(b) A three-judge court was properly convened, pursuant to 28 U.S.C. § 2281;

(c) The cigarette excise tax imposed by the State of Montana is invalid, and the State of Montana is hereby permanently enjoined from imposing said tax with respect to the sale of cigarettes on the Flathead Indian Reservation, Montana, by a member of plaintiff Tribes to any Indian who resides on the Flathead Indian Reservation, regardless of whether the Indian purchaser is a member of plaintiff Tribes; and

(d) The cigarette dealer's license tax imposed by the State of Montana is invalid, and the State of Montana is hereby permanently enjoined from imposing said license tax and from requiring the possession of a cigarette dealer's license, with respect to members of plaintiff Tribes who sell cigarettes to anyone on the Flathead Indian Reservation.

2. That except as stated in paragraph 1, plaintiffs' motion for summary judgment is denied and defendants' motion for summary judgment is granted to the extent that defendants may require plaintiffs and other tribal members, who sell cigarettes on the Flathead Reservation, to precollect the state cigarette tax imposed on non-Indian purchasers pursuant to Chapter 56, Title 84, R.C.M. 1947, and regulations promulgated thereunder.

3. That the denial of the motion of defendants Moe and Phillips to dismiss this case as to them is reaffirmed.

4. That the motion of defendant Phillips to join the Department of Revenue of the State of Montana as a necessary party defendant has been mooted by the voluntary joinder of the Department of Revenue as a party defendant.

5. That each party bear his or its own costs of this proceeding.

DONE AND DATED this 19th day of March, 1975.

s/James R. Browning
United States Circuit Judge

s/William J. Jameson
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

FILED
March 19, 1975
John E. Pederson, Clerk
By: Dora Lou Sevener,
Deputy Clerk

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, Frederick J. Houle, Jr., Secretary and A Member of the Tribes; Clarence Woodcock, A Member of the Tribes; John Barnaby, A Member of the Tribes; Abel Coombs, A Member of the Tribes, Each on Behalf of Himself or Herself and All Other Members of the Tribes,

Plaintiffs,

v.

THE STATE OF MONTANA; Department of Revenue, Keith L. Colbo, In His Official Capacity As Director, Department of Revenue, State of Montana; Wilson A. Burley, Albert Meyers, and Don Corrigan, Each In His Official Capacity As Commissioner of Lake County, and Marjorie Knaus, In Her Official Capacity As Treasurer Of Lake County; Roy M. De Long, Wesley Stearns, and Henry Kraus, Jr.,

Civil No. 74-40-M

JUDGMENT

Each In His Official Capacity As Commissioner of Sanders County, And June M. Thayer, In Her Capacity as Treasurer of Saunders County, and H. W. Stoutenberg, Richard Ostergren, and L. G. Browman, Each In His Official Capacity As Commissioner of Missoula County, and Sophie Cahill, In Her Official Capacity As Treasurer of Missoula County,

Defendants.

This cause came before the court on motions for summary judgment filed by all of the parties pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure. Pursuant to 28 U.S.C. § 2281 a three-judge court was convened, consisting of the Honorable James R. Browning, Circuit Judge, Russell E. Smith, Chief District Judge, and William J. Jameson, District Judge. Following extensive discovery, the filing of briefs and a hearing, the issues having been fully heard and all the briefs considered, and an order and opinion having been duly rendered and filed on March 19, 1975;

IT IS ORDERED, ADJUDGED AND DECREED:

1. The motion of plaintiffs for summary judgment is granted to the extent herein provided, and the defendant The State of Montana and its officials and agents are enjoined from collecting personal property taxes, including the property tax on motor vehicles, from members of the plaintiff Tribes residing on the Flathead Indian Reservation:

(a) The Court has jurisdiction to determine this cause with respect to plaintiff Tribes pursuant to 28 U.S.C. § 1362, and with respect to individual plaintiffs pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, which jurisdiction is not defeated by 28 U.S.C. § 1341;

(b) A three-judge court was properly convened, pursuant to 28 U.S.C. § 2281;

(c) The enforcement against plaintiffs of the provisions of Title 53, *Rev. Mont. Code,* §§ 114, 1025-1029, and Title 84, *Rev. Mont. Code,* §§ 201, 301, 302, 404, 406, 409, 410, 4201 and 4202 and related statutes for the assessment and collection of personal property taxes generally, and in particular of personal property taxes on motor vehicles, is unconstitutional, and the State of Montana is hereby permanently enjoined from assessing and collecting said taxes from the members of plaintiff Tribes residing on the Flathead Indian Reservation.

2. That defendants pay to plaintiffs the costs of this proceeding.

DONE AND DATED this 19th day of March, 1975.

s/James R. Browning
United States Curcuit Judge

s/William J. Jameson
United States District Judge

NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

FILED
May 6, 1975
John E. Pederson, Clerk
J. C. Bertoglia,
Deputy Clerk

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA ("TRIBES"); HAROLD W. MITCHELL, JR., CHAIRMAN OF THE TRIBAL COUNCIL AND A MEMBER OF THE TRIBES, JOSEPH ANTHONY WHEELER, JR., A MEMBER OF THE TRIBES, AND DOROTHY E. WHEELER CLINKENBEARD, A MEMBER OF THE TRIBES, EACH ON BEHALF OF HIMSELF AND HERSELF AND ALL OTHER MEMBERS OF THE TRIBES.

Plaintiffs,

vs.

JOHN C. MOE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF MISSOULA, MONTANA, WILLIAM A. PHILLIPS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF LAKE, MONTANA, THE DEPARTMENT OF REVENUE, STATE OF MONTANA,

Civil No. 2145

NOTICE OF APPEAL

AND KEITH L. COLBO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MONTANA,

Defendants.

NOTICE IS HEREBY GIVEN that the Defendants Department of Revenue, State of Montana, and William A. Groff, Director, Department of Revenue, State of Montana, hereby appeal to the Supreme Court of the United States from the following portions of the final Judgment of a three-judge district court entered in this action on March 19, 1975:

"1. That to the extent stated in the following paragraphs, plaintiffs' motion for summary judgment is granted and defendant State of Montana and its agents and officials are enjoined from imposing and collecting certain cigarette taxes:

(a) The Court has jurisdiction to determine this cause with respect to plaintiff Tribes pursuant to 28 U.S.C. § 1362, and with respect to individual plaintiffs pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, which jurisdiction is not defeated by 28 U.S.C. § 1341;

(b) A three-judge court was properly convened, pursuant to 28 U.S.C..§ 2281;

(c) The cigarette excise tax imposed by the State of Montana is invalid, and the State of Montana is hereby permanently enjoined from imposing said tax with respect to the sale of cigarettes on the Flathead Indian Reservation, Montana, by a member of plaintiff Tribes to any Indian who resides on the Flathead Indian Reservation, regardless of whether the Indian purchaser is a member of plaintiff Tribes; and

(d) The cigarette dealer's license tax imposed by the State of Montana is invalid, and the State of Montana is invalid, and the State of Montana is hereby permanently

enjoined from imposing said license tax and from requiring the possession of a cigarette dealer's license, with respect to members of plaintiff Tribes who sell cigarettes to anyone on the Flathead Indian Reservation."

This appeal is taken pursuant to 28 U.S.C. 1253.

DATED this 5th day of May, 1975.

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s/Sam E. Haddon
Attorneys for Defendants State
of Montana, Department of Revenue,
State of Montana, and William A. Groff,
Director, Department of Revenue,
State of Montana

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Notice of Appeal in the above entitled action was served upon counsel of record by mailing true copies thereof, first class postage prepaid as follows:

Robert L. Deschamps, III, Esq.
Missoula County Attorney
Missoula County Courthouse
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and by mailing a true copy thereof, first class air mail postage prepaid to the following attorney:

Richard A. Baenen, Esq.
Attorney at Law
1735 New York Avenue, N. W.
Washington, D.C. 20006

DATED this 5th day of May, 1975.

s/Sam E. Haddon

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, Frederick J. Houle, Jr., Secretary and A Member of the Tribes; Clarence Woodcock, A Member of the Tribes; John Barnaby, A Member of the Tribes; Abel Coombs, A Member of the Tribes, Each on Behalf of Himself or Herself and All Other Members of the Tribes,

Plaintiffs,

v.

THE STATE OF MONTANA; Department of Revenue, Keith L. Colbo, In His Official Capacity As Director, Department of Revenue, State of Montana; Wilson A. Burley, Albert Meyers, and Don Corrigan, Each in His Official Capacity As Commissioner of Lake County, and Marjorie Knaus, In Her Official Capacity As Treasurer of Lake County; Roy M. De Long, Wesley Stearns, and Henry Kraus, Jr., Each In His Official Capacity As Commissioner of Sanders County, and June M. Thayer, In Her Capacity as Treasurer of Sanders County, and H. W. Stoutenberg, Richard Ostergren, and L. G.

FILED
May 6, 1975
John E. Pederson, Clerk
I. C. Bertoglia,
Deputy Clerk

Civil No.
74-40-M

NOTICE OF APPEAL

Browman, Each In His Official Capacity As Commissioner of Missoula County, and Sophie Cahill, In Her Official Capacity as Treasurer of Missoula County,

Defendants.

NOTICE IS HEREBY GIVEN that the Defendants Department of Revenue, State of Montana, and William A. Groff, Director, Department of Revenue, State of Montana, hereby appeal to the Supreme Court of the United States from the final Judgment of a three-Judge district court entered in this action on March 19, 1975, which held:

"1. The motion of plaintiffs for summary judgment is granted to the extent herein provided, and the defendant The State of Montana and its officials and agents are enjoined from collecting personal property taxes, including the property tax on motor vehicles, from members of the plaintiff Tribes residing on the Flathead Indian Reservation:

(a) The Court has jurisdiction to determine this cause with respect to plaintiff Tribes pursuant to 28 U.S.C. § 1362, and with respect to individual plaintiffs pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, which jurisdiction is not defeated by 28 U.S.C. § 1341;

(b) A three-judge court was properly convened, pursuant to 28 U.S.C. § 2281;

(c) The enforcement against plaintiffs of the provisions of Title 53, *Rev. Mont. Code,* §§ 114, 1025-1029, and Title 84, *Rev. Mont. Code,* §§ 201, 301, 302, 404, 406, 409, 410, 4201 and 4202 and related statutes for the assessment and collection of personal property taxes generally, and in particular of personal property taxes on motor vehicles, is unconstitutional, and the State of Montana is hereby permanently enjoined from assessing and collecting said taxes from the members of plaintiff Tribes residing on the Flathead Indian Reservation."

This appeal is taken pursuant to 28 U.S.C. 1253.

DATED this 5th day of May, 1975.

ROBERT L. WOODAHL
Attorney General for the
State of Montana
State Capitol Building
Helena, Montana 59601

JEAN A. TURNAGE
Special Assistant Attorney
General
P.O. Box 450
Polson, Montana 59860

SAM E. HADDON
Special Assistant Attorney
General
First National Bank Building
Missoula, Montana 59801

s/Sam E. Haddon

Attorneys for Defendants State
of Montana, Department of
Revenue, State of Montana, and
William A. Groff, Director,
Department of Revenue, State
of Montana

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Notice of Appeal in the above entitled action was served upon counsel of record by mailing true copies thereof, first class postage prepaid as follows:

Robert L. Deschamps, III, Esq.
Missoula County Attorney
Missoula County Courthouse
Missoula, Montana 59801

Alex Morrison, Esq.
Sanders County Attorney
P.O. Box 326
Plains, Montana 59859

Richard P. Heinz, Esq.
Lake County Attorney
P.O. Box 88
Polson, Montana 58860

Victor F. Valgenti, Esq.
Attorney at Law
212 First Federal Building
Missoula, Montana 59801

and by mailing a true copy thereof, first class air mail postage prepaid to the following attorney:

Richard A. Baenen, Esq.
Attorney at Law
1735 New York Avenue, N.W.
Washington, D.C. 20006

DATED this 5th day of May, 1975.

s/Sam E. Haddon

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION MONTANA ("TRIBES"); HAROLD W. MITCHELL, JR., CHAIRMAN OF THE TRIBAL COUNCIL AND A MEMBER OF THE TRIBES, JOSEPH ANTHONY WHEELER, JR., A MEMBER OF THE TRIBES, AND DOROTHY E. WHEELER CLINKENBEARD, A MEMBER OF THE TRIBES, EACH ON BEHALF OF HIMSELF AND HERSELF AND ALL OTHER MEMBERS OF THE TRIBES,

Plaintiffs,

v.

JOHN C. MOE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF MISSOULA, MONTANA, WILLIAM A. PHILLIPS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF IN AND FOR THE COUNTY OF LAKE, MONTANA, THE DEPARTMENT OF REVENUE, STATE OF MONTANA, AND KEITH L. COLBO, INDIVIDUALLY AND IN

FILED
May 15, 1975
John E. Pederson, Clerk
By: Doreen F. Hugo,
Deputy Clerk

Civil No. 2145

NOTICE OF APPEAL

AND

DESIGNATION OF ATTORNEY

HIS OFFICIAL CAPACITY AS DIRECTOR, DEPARTMENT OF REVENUE, STATE OF MONTANA,

Defendants.

NOTICE IS HEREBY GIVEN that the defendants John C. Moe and William A. Phillips hereby appeal to the Supreme Court of the United States from the following portions of the final Judgment of a Three-Judge District Court entered in this action on Marcy 19, 1975:

"1. That to the extent stated in the following paragraphs, plaintiffs' motion for summary judgment is granted and defendant State of Montana and its agents and officials are enjoined from imposing and collecting certain cigarette taxes:

"1. The motion of plaintiffs for summary judgment is granted to the extent herein provided, and the defendant The State of Montana and its officials and agents are enjoined from collecting personal property taxes, including the property tax on motor vehicles, from members of the plaintiff Tribes residing on the Flathead Indian Reservation:

(a) The Court has jurisdiction to determine this cause with respect to plaintiff Tribes pursuant to 28 U.S.C. § 1362, and with respect to individual plaintiffs pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, which jurisdiction is not defeated by 28 U.S.C. § 1341;

(b) A three-judge court was properly convened, pursuant to 28 U.S.C. § 2281;

(c) The enforcement against plaintiffs of the provisions of Title 53, *Rev. Mont. Code,* §§ 114, 1025-1029, and Title 84, *Rev. Mont. Code,* §§ 201, 301, 302, 404, 406, 409, 410, 4201 and 4202 and related statutes for the assessment and collection of personal property taxes generally, and in particular of personal property taxes on motor vehicles, is unconstitutional, and the State of Montana is hereby per-

manently enjoined from assessing and collecting said taxes from the members of plaintiff Tribes residing on the Flathead Indian Reservation."

This appeal is taken pursuant to 28 U.S.C. § 1253.

That the following counsel are hereby designated to act as counsel for the above appellants in this appeal:

Robert L. Woodahl, Attorney General for the State of Montana, State Capitol Building, Helena, MT. 59601

Jean A. Turnage, Special Assistant Attorney General, P.O. Box 450, Polson, MT. 59860

Sam E. Haddon, Special Assistant Attorney General, First National Bank Bldg., Missoula, MT. 59801

DATED this 13th day of May, 1975.

s/Richard P. Heinz

Richard P. Heinz, Esq. Attorney for William A. Phillips

s/Robert L. Deschamps

Robert L. Deschamps III by Harold V. Dye, Esq., Attorney for John C. Moe

s/Harold V. Dye

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Notice of Appeal in the above entitled action was served upon counsel of record by mailing true copies thereof, first class postage prepaid thereon as follows:

Victor F. Valgenti, Esq.,
Attorney at Law
212 First Federal Bldg.
Missoula, Montana 59801

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Special Assistant Attorney General
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Missoula, Montana 59801

Jean A. Turnage
Special Assistant Attorney General
P.O. Box 450
Polson, Montana 59860

Robert L. Woodahl
Attorney General, State of Montana
Capitol Building, Helena, Montana
59601

and by mailing a true copy thereof, first class air mail postage prepaid thereon to the following attorney:

Richard A. Baenen, Esq.
Attorney at Law
1735 New York Avenue, N.W.
Washington, D.C. 20006

DATED this 13th day of May, 1975.

s/Harold V. Dye

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, Frederick J. Houle, Jr. Secretary and a Member of the Tribes; Clarence Woodcock, a Member of the Tribes; Abel Coombs, a Member of the Tribes, Each on Behalf of Himself or Herself and All Other Members of the Tribes,

Plaintiffs,

v.

THE STATE OF MONTANA: Department of Revenue, Keith L. Colbo, In His Official Capacity as Director, Department of Revenue, State of Montana; Wilson A. Burley, Albert Meyers, and Don Corrigan, Each in His Official Capacity as Commissioner of Lake County, and Marjorie Knaus, In Her Official Capacity as Treasurer of Lake County; Roy M. DeLong, Wesley Stearns, and Henry Kraus, Jr., Each in His Official Capacity as Commissioner of Sanders County, and June M. Thayer, In Her Capacity as Treasurer of Sanders County, and H. W. Stoutenberg, Richard Ostergren, and L. G.

FILED
May 15, 1975
John E. Pederson, Clerk
By: Doreen F. Hugo,
Deputy Clerk

Civil No.
74-40-M

NOTICE OF APPEAL

and

DESIGNATION OF ATTORNEY

Browman, Each in His Official Capacity As Commissioner of Missoula County, and Sophie Cahil, In Her Official Capacity as Treasurer of Missoula County,

Defendants.

NOTICE IS HEREBY GIVEN that the defendants Wilson A. Burley, Albert Meyers, Don Corrigan, Marjorie Knaus, Roy M. DeLong, Wesley Stearns, Henry Kraus, Jr., June M. Thayer, H. W. Stoutenberg, Richard Ostergren, L. G. Browman, and Sophie Cahil hereby appeal to the Supreme Court of the United States from the final Judgment of the Three-Judge District Court entered in this action on March 19, 1975, which held:

(a) The Court has jurisdiction to determine this cause with respect to plaintiff Tribes pursuant to 28 U.S.C. § 1362, and with respect to individual plaintiffs pursuant to 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, which jurisdiction is not defeated by 28 U.S.C. § 1341;

(b) A Three-Judge Court was properly convened pursuant to 28 U.S.C. § 2281;

(c) The cigarette excise tax imposed by the State of Montana is invalid, and the State of Montana is hereby permanently enjoined from imposing said tax with respect to the sale of cigarettes on the Flathead Indian Reservation, Montana, by a member of plaintiff Tribes to any Indian who resides on the Flathead Indian Reservation, regardless of whether the Indian purchaser is a member of plaintiff Tribes; and

(d) The cigarette dealer's license tax imposed by the State of Montana is valid, and the State of Montana is hereby permanently enjoined from imposing said license tax and from requiring the possession of a cigarette dealer's license, with respect to members of plaintiff Tribes who sell cigarettes to anyone on the Flathead Indian Reservation."

This appeal is taken pursuant to 28 U.S.C. 1253.

That the following counsel are hereby designated to act as counsel for the above appellants in this appeal:

Robert L. Woodahl,
Attorney General for the State of Montana
State Capitol Building
Helena, MT. 59601

Jean A. Turnage
Special Assistant Attorney General
P.O. Box 450
Polson, MT. 59860

Sam E. Haddon
Special Assistant Attorney General
First National Bank Building
Missoula, MT. 59801

DATED this 13th day of May, 1975.

s/Richard P. Heinz
Richard P. Heinz, Esq.
Attorney for Wilson A. Burley, Albert Meyers, Don Corrigan, and Marjorie Knaus.

s/Robert L. Fletcher
Robert L. Fletcher, Esq.
Attorney for Roy M. DeLong, Wesley Stearns, Henry Kraus, Jr. and June M. Thayer

s/Harold V. Dye
Robert L. Deschamps III, Esq. by Harold V. Eye, Esq. Attorney for H. W. Stoutenberg, Richard Ostergren,
L. G. Browman and Sophie Cahill

CERTIFICATE OF SERVICE

The Undersigned certifies that the foregoing Notice of Appeal in the above entitled action was served upon counsel of record by mailing true copies thereof, first class postage prepaid thereon as follows:

Victor F. Valgenti, Esq.
Attorney at Law
212 First Federal Building
Missoula, Montana 59801

Sam E. Haddon
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Jean A. Turnage
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Polson, Montana 59860

Robert L. Woodahl
Attorney General for the State of Montana
State Capitol Building
Helena, Montana 59601

and by mailing a true copy thereof, first class air mail postage prepaid thereon to the following attorney:

Richard A. Baenen, Esp.
Attorney at Law
1735 New York Avenue, N.W.
Washington, D.C. 20006

DATED this 13th day of May, 1975.

s/Harold V. Dye

HELL GATE TREATY (12 Stat. 975)

TREATY WITH THE FLATHEADS, &c.
July 16, 1855

Treaty between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians. Concluded at Hell Gate in the Bitter Root Valley, July 16, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 18, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at the treaty ground, at Hell Gate, in the Bitter Root Valley, on the sixteenth day of July, eighteen hundred and fifty-five, between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the hereinafter named chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes and duly authorized thereto, by them, which treaty is in the words and figures following, to wit:

Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said

confederated tribes and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes recognise Victor as said head chief.

ARTICLE I. The Said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49th) parallel of latitude, thence westwardly on that parallel to the divide between the Flat-bow or Kootenay River and Clarke's Fork; thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°,) thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d,Alene Rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the head waters of the Koos-koos-kee River and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root River from the waters flowing into the Salmon and Snake Rivers to the main ridge of the Rocky Mountains, and thence northerly along said main ridge to the place of beginning.

ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko

River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west, the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States, and upon any ground claimed or occupied if with the permission of the owner or claimant.

Guaranteeing however the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. *And provided,* That any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

ARTICLE III. *And provided,* That if necessary for the public convenience roads may be run through the said

reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars in the following manner — that is to say: For the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officers, shall each year inform the President of the wishes of the Indians in relation thereto.

ARTICLE V. The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to

the children of the said tribes, and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures, and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provide with the necessary furniture the buildings required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected and will be called upon to perform many services of a public character, occupying much of their time, the United States further agree to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agrees to be paid to said tribe. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

ARTICLE VI. The President may from time to time, at

his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

ARTICLE VII. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

ARTICLE VIII. The aforesaid confederated tribes of Indians acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit to depredations upon the property of such citizens. And should one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the givernment out of the annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

ARTICLE IX. The said confederated tribes desire to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

ARTICLE X. The United States further agree to

guaranty the exclusive use of the reservation provided for in this treaty, as against any claims which may be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading post on the Pru-in River by the servants of that company.

ARTICLE XI. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be opened to settlement until such examination is had and the decision of the President made known.

ARTICLE XII. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs and principal men of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, [L. S.]

Governor and Superintendent Indian Affairs W.T.

VICTOR, *Head chief of the Flathead Nation,*	his x mark.	[L. S.]
ALEXANDER, *Chief of the Upper Pend d'Oreilles,*	his x mark.	[L. S.]
MICHELLE, *Chief of the Kootenays,*	his x mark.	[L. S.]
AMBROSE,	his x mark.	[L. S.]
PAH-SOH,	his x mark.	[L. S.]
BEAR TRACK,	his x mark.	[L. S.]
ADOLPHE,	his x mark.	[L. S.]

THUNDER,	his x mark. [L. S.]
BIG CANOE,	his x mark. [L. S.]
KOOTEL CHAH,	his x mark. [L. S.]
PAUL,	his x mark. [L. S.]

U.S. CONSTITUTIONAL PROVISIONS

ART. I, SEC. 8, CL. 3

8. The congress shall have power—
To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of live, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT 14

1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT 15

1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.

General Allotment Act, 25 U.S.C. § 349, 24 Stat. 390

§ 349. Patents in fee to allotees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act [25 USCS § 348], then each and every allotee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of this act shall not extend to any Indians in the Indian Territory.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments have been made under the provisions of

this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

Act of June 2, 1924, 43 Stat. 253

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to the citizens of the United States: *Provided,* That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

Approved, June 2, 1924.

28 U.S.C. § 1341

Taxes by States.—The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

MONTANA STATUTES

53-114. Application for registration of motor vehicles and payment of license fees thereon — assessment of motor vehicles in the stock of licensed motor vehicle dealers as merchandise. (1) Every owner of a motor vehicle operated or driven upon the public highways of this state shall, for each motor vehicle owned, except as herein otherwise expressly provided, file, or cause to be filed, in the office of the county treasurer wherein such motor vehicle is owned or taxable, an application for registration, or reregistration, upon blank form to be prepared and furnished by the registrar of motor vehicles, which application shall contain:

(a) Name and address of owner, giving county, school district, and town or city within whose corporate limits the motor vehicle is taxable.

(b) Name and address of conditional sales vendor, mortgagee or holder of other lien against said motor vehicle, with statement of amount owing under such contract or lien.

(c) Description of motor vehicle, including make, year model, engine or serial number, manufacturer's model or letter, gross weight, type of body and, if truck, the rated capacity.

(d) In case of reregistration, the license number for the preceding year.

(e) Such other information as the registrar of motor vehicles may require.

(2) Whoever files an application for registration or reregistration of a motor vehicle except of a mobile home as defined in section 84-101, R.C.M., 1947, shall before filing such application with the county treasurer submit the same to the county assessor of said county and said county assessor shall enter on said application in a space to be provided for that purpose, the full and true and the assessed valuation of said vehicle for the year for which said application for registration is made.

(3) Whoever files an application for registration or reregistration of a motor vehicle except of a mobile home as defined in section 84-101, R.C.M., 1947, shall upon the filing of said application (1) pay to the county treasurer the registration fee, as provided in section 53-122 and section

53-115, and shall also at such time (2) pay the personal property taxes assessed or the new motor vehicle sales tax against said vehicle for the current year of registration (unless the same shall have been theretofore paid for said year) before the application for registration or reregistration may be accepted by the county treasurer. The county treasurer is hereby empowered to make full and complete investigation of the tax status of said vehicle and any applicant for registration or reregistration must submit proof with respect thereto from the tax records of the proper county at the request of the county treasurer.

(4) The amount of taxes on said motor vehicle, except a mobile home as defined in section 84-101, R.C.M., 1947, shall be computed and determined by the county treasurer on the basis of the levy of the year preceding the current year of application for registration or reregistration and such determination shall be entered on the application form in a space provided therefor.

(5) Motor vehicles, except mobile homes as defined in section 84-101, R.C.M., 1947, are hereby declared to be assessable for taxation as of and on the first day of January in each year irrespective of the time fixed by law for the assessment of other classes of personal property, and irrespective of whether or not the levy and tax may be a lien upon real property within the state of Montana, provided that in no event shall any motor vehicle be subject to assessment, levy and taxation more than once in each year.

(6) The applicant for original registration of any wholly new and unused motor vehicle except a mobile home as defined in section 84-101, R.C.M., 1947, acquired by original contract after the first day of January of any year shall be required, whenever such vehicle has not been otherwise assessed, to pay the motor vehicle sales tax provided by section 32-3315, R.C.M., 1947, irrespective of whether or not such vehicle was in the state of Montana on the first day of January of such year.

(7) Upon accepting application for registration or reregistration of any motor vehicle which is subject to taxation in this state on January 1 in any year, and upon payment of taxes, the county treasurer shall stamp on said

application: "taxes on this vehicle due January 1 of current year paid by applicant, prior applicant or owner and this vehicle is eligible for registration."

Upon accepting application for registration of any motor vehicle which was not subject to taxation in this state on January 1st in any year, the county treasurer shall indicate such fact by proper entry on said application.

(8) The registrar of motor vehicles shall have authority to make proper entry on any certificate of title to any motor vehicle respecting payment of taxes in accord with the facts.

53-1025. Display of tax-paid decals on snowmobiles required—application and issuance. (a) No snowmobile shall be operated by any person in the state of Montana unless there is displayed in a conspicuous place thereon a decal as visual proof that Montana personal property taxes have been paid thereon for the current year. Application for the issuance of such tax-paid decal shall be made to the county treasurer upon forms to be furnished for this purpose, which may be obtained from the registrar of motor vehicles or at the county assessor's office in the county wherein the owner resides, and is to provide for substantially the following information: name of owner, address, registration number, name of manufacturer, model number, make, horsepower, year of manufacture, statement evidencing assessment, payment of property tax, and such other information as the registrar of motor vehicles may require. Said application shall be signed by the county treasurer and transmitted by him to the registrar of motor vehicles accompanied by a fee of two dollars ($2). All moneys collected from payment of such fees shall be turned over to the state treasurer and placed by him in the earmarked revenue fund to the credit of the state fish and game commission, with one dollar ($1) designated for use in enforcing the purposes of this act and one dollar ($1) designated for use in developing snowmobile facilities. Upon receipt of the application in approved form the registrar of motor vehicles or county treasurer shall issue to the applicant a decal in the style and design prescribed by the registrar of motor vehicles and of a different color than the preceding year, numbered numerically.

(b) Before filing the application with the county treasurer, the applicant shall submit the same to the county assessor of the county and the county assessor shall enter on the application in a place provided for that purpose, the full and true and assessed valuation of the snowmobile for the year for which the application is made.

(c) The applicant shall pay the county treasurer the application fee and shall also pay the personal property taxes assessed against the snowmobile for the current year before the application for registration or reregistration may be accepted by the county treasurer.

History: En. Sec. 2, Ch. 435, L. 1971; amd. Sec. 19, Ch. 391, L. 1973; amd. Sec. 1, Ch. 494, L. 1973; amd. Sec. 2, Ch. 249, L. 1974.

Amendments

Chapter 391, Laws of 1973, substituted references to the department of revenue for references to the board of equalization throughout the section.

Chapter 494, Laws of 1973, made the same changes as did Chapter 391, and in addition inserted "or the county treasurer" near the beginning of the second sentence; substituted "county treasurer" for "owner" near the beginning of the third sentence; increased the fee for the decal from $1.00 to $2.00 at the end of the third sentence; inserted the fourth sentence; inserted "or county treasurer" near the beginning of the fifth sentence; and made minor changes in phraseology.

The 1974 amendment deleted "state department of revenue" before "the county treasurer" in the second sentence of subsection (a); substituted "registrar of motor vehicles" for "department" throughout subsection (a); added subsections (b) and (c); and made minor changes in style.

53-1025.1. Duplicate registration receipt or decal. In the event any registration receipt or decal shall be lost, mutilated or become illegible, the persons to whom the same shall have been issued shall immediately

make application for and may obtain a duplicate thereof, upon payment of a fee of one dollar ($1) to the county treasurer.

History: En. Sec. 2, Ch. 494, L. 1973.

Title of Act

An act to provide that the fee of two dollars ($2) for issuance of decals for snowmobiles shall be deposited with the state treasurer to the credit of the state fish and game commission; amending section 53-1025, R. C. M. 1947.

53-1026. Application to be made annually. Application must be made to the county treasurer for the issuance of tax-paid decals annually. All tax-paid decals expire on December 31 of the year in which they are issued and application for the issuance of a tax-paid decal must be filed with the county treasurer not later than January 31 of each year.

History: En. Sec. 3, Ch. 435, L. 1971; amd. Sec. 3, Ch. 249, L. 1974.

Amendments

The 1974 amendment substituted "county treasurer" for "board" in the first sentence; deleted "Snowmobiles may be operated between January 1 and January 20 in each year without displaying the current year's decal on the condition that application therefor has been made"; and added the second sentence.

53-1027. Failure to display decal a misdemeanor—penalty. The failure to display a current tax-paid decal during the time provided in this act shall constitute a misdemeanor, punishable by a fine of not less than ten dollars ($10) nor more than fifty dollars ($50).

History: En. Sec. 4, Ch. 435, L. 1971.

53-1028. Officers authorized to enforce act. The fish and game commission, enforcement personnel, the sheriffs and their deputies of the various counties of the state, the Montana highway patrol, and the police of each municipality shall enforce the provisions of this act.

History: En. Sec. 5, Ch. 435, L. 1971.

53-1029. Issuance of dealer registration certificate. (1) A dealer registration certificate shall be issued in accordance with this act.

(2) Upon receipt of dealer application and payment of fees which will be five dollars ($5), the dealer shall be issued two (2) dealer snowmobile identification cards which will be carried by dealer or dealer's customer when operating or demonstrating dealer's snowmobiles.

(3) No bond will be required of the dealer.

(4) Additional dealer snowmobile identification cards may be purchased by the dealer for a fee of two dollars ($2).

History: En. Sec. 3, Ch 494, L. 1973.

CHAPTER 11—MOTOR VEHICLE INSPECTIONS

Section 53-1101. Vehicle inspection required.
53-1102. Times of inspection.
53-1103. Licensing of inspection stations.
53-1104. Supervision of inspection stations.
53-1105. Certification of vehicles.
53-1106. Inspection fee—additional requirements for certification—handling of vehicle—owner complaints.
53-1107. Repairs to substandard vehicles—fee paid to department by inspection stations.

84.201. Property subject to taxation. All property in this state is subject to taxation, except as provided in the next section.

CHAPTER 3—CLASSIFICATION OF PROPERTY FOR TAXATION--BASIS FOR TAXATION

Section
84-301. Classification of property for taxation.
84-302. Basis for imposition of taxes.
84-307. Assessment of shares of banks—deductions.
84-308. Basis for imposition of taxes on moneys and credits, moneyed capital and bank shares.

84-301. (1999) **Classification of property for taxation.** For the purpose of taxation the taxable property in the state shall be classified as follows:

Class One. The annual net proceeds of all mines and mining claims, after deducting only the expenses specified and allowed by section 84-5403; also where the right to enter upon land, to explore or prospect, or dig for oil, gas, coal or mineral is reserved in land by any person or corporation, the surface title to which has passed to another, the state department of revenue shall determine the value of the right to enter upon said tract of land for the purpose of digging, exploring, or prospecting for gas, oil, coal or minerals, and the same shall be placed in this classification for the purpose of taxation.

Class Two. All agricultural and other tools, implements and machinery, gas and other engines and boilers, threshing machines and outfits used therewith, automobiles, motor trucks and other power-driven cars, vehicles of all kinds except mobile homes, boats and all watercraft, harness, saddlery and robes and except as provided in Class Five (b) of this section, all poles, lines, transformers, transformer stations, meters, tools, improvements, machinery and other property used and owned by all persons, firms, corporations, and other organizations which are engaged in the business of furnishing telephone communications, exclusively to rural areas, or to rural areas and cities and towns provided that any such city or town has a population of eight hundred (800) persons or less; and provided further, that the average circuit miles for each station on the system is more than one and one-quarter (1 ¼) miles.

Class Three. Livestock, poultry and unprocessed products of both; stocks of merchandise of all sorts, together with furniture and fixtures used therewith, except mobile homes; and all office or hotel furniture and fixtures.

Class Four. (a) All land, town and city lots, with improvements, and all trailers affixed to land owned, leased, or under contract or purchase by the trailer owner, manufacturing and mining machinery, fixtures and supplies, except as otherwise provided by the constitution of Montana, and except as such property may be included in Class Five, Class Seven or Class Eight.

(b) Mobile homes without regard to the ownership of the land upon which they are situated, except those held by a distributor or dealer of mobile homes as part of his stock in trade, and except as such property may be included in Class Eight.

Class Five. (a) * * * [Same as parent volume.]

(b) All poles, lines, transformers, transformer stations, meters, tools, improvements, machinery and other property used and owned by co-

operative rural electrical and co-operative rural telephone associations organized under the laws of Montana except those within the incorporated limits of a city or town in which less than ninety-five per cent (95%) of the electric consumers and/or telephone users are served by a co-operative organization, and as to the property enumerated in this subsection (b) within incorporated limits of a city or town in which less than ninety-five per cent (95%) of the electric consumers or users will be served by a co-operative organization, such property shall be put in Class Two.

(c) All unprocessed agricultural products either on the farm or in storage, irrespective of whether said products are owned by the elevator, warehouse or flour mill owner or company storing the same, or any other person whomsoever, and excepting livestock and poultry and the unprocessed products of both.]

(d) The dwelling house, and the lot on which it is erected, owned and occupied by any resident of the state, who has been honorably discharged from active service in any branch of the armed forces, who is rated one hundred per cent (100%) disabled due to a service-connected disability by the United States veterans administration or its successors.

In the event of the veteran's death, the dwelling house, and the lot on which it is erected, so long as the widow remains unmarried and the owner and occupant of the property, shall remain within this classification.

Class Six. Property formerly included in this class is now classified by section 84-308, R. C. M. 1947.

Class Seven. (a) All new industrial property. New industrial property shall mean any new industrial plant, including land, buildings, machinery and fixtures which, in the determination of the state department of revenue, is used by a new industry during the first three (3) years of operation not having been assessed prior to July 1, 1961, within the state of Montana. New industry shall mean any person, corporation, firm, partnership, association, or other group which establishes a new plant or plants in this state for the operation of a new industrial endeavor, as distinguished from a mere expansion, reorganization, or merger of an existing industry or industries. Provided, however, that new industrial property shall be limited to industries that manufacture, mill, mine, produce, process or fabricate materials, or do similar work in which capital and labor are employed and in which materials unserviceable in their natural state are extracted, processed or made fit for use or are substantially altered or treated so as to create commercial products or materials; and in no event shall the term new industrial property be included to mean property used by retail or wholesale merchants, commercial services of any type, agriculture, trades or professions. And provided further, that new industrial property shall not be included to mean property which is used or employed in any industrial plant which has been in operation in this state for three (3) years or longer. Any person, corporation, firm, partnership, association or other group seeking to qualify its property

for inclusion in this class shall make application to the state department of revenue in such manner and form as may be required by said department.

Class Eight. Any improvement on real property, trailers affixed to land or mobile home belonging to any person who qualifies under any one or more of the hereinafter set forth categories, valued at not more than seventeen thousand five hundred dollars ($17,500), which is owned or under a contract for deed, and which is actually occupied by:

(1) a widow sixty-two (62) years of age or older, whether with or without minor dependent children, who qualifies under the income limitations of (4), or

(2) a widower sixty-five (65) years of age or older, whether with or without minor dependent children, who qualifies under the income limitations of (4), or

(3) a widow with minor or dependent children regardless of age, who qualifies under the income limitations of (4), or

(4) a recipient of retirement benefits whose income from all sources is not more than four thousand dollars ($4,000) for a single person and five thousand two hundred dollars ($5,200) for a married couple per annum. Provided, further, that one who applies for classification of property under this class must make an affidavit to the state department of revenue on a form as may be provided by the state department of revenue supplied without cost to the applicant, as to his income, if applicable, as to his retirement benefits, if applicable, or, as to his marital status, if applicable, and to the fact that he or she actually occupies such improvements with right of the county welfare board to investigate the applicant, on the completion of the form, as to answers given on the form. Provided, further, that the value of said property shall not increase during the life of the recipient of retirement benefits or widow or widower covered under this class. For purposes of the affidavit required for classification of property under this class, it shall be sufficient if the applicant signs a statement swearing to or affirming the correctness of the information supplied, whether or not the statement is signed before a person authorized to administer oaths, and mails the application and statement to the department of revenue. This signed statement shall be treated as a statement under oath or equivalent affirmation for purposes of section 94-7-203, R. C. M. 1947, relating to the criminal offense of false swearing.

Class Nine. All property not included in the eight (8) preceding classes.]

History: En. Sec. 1, Ch. 51, L. 1919; amd. Sec. 1, Ch. 248, L. 1921; re-en. Sec. 1999, R. C. M. 1921; amd. Sec. 1, Ch. 130, L. 1937; amd. Sec. 1, Ch. 107, L. 1941; amd. Sec. 1, Ch. 286, L. 1947; amd. Sec. 1, Ch. 45, L. 1951; amd. Sec. 1, Ch. 178, L. 1951; amd. Sec. 1, Ch. 88, L. 1957; amd. Sec. 1, Ch. 103, L. 1961; amd. Sec. 2, Ch. 239, L. 1961; amd. Sec. 1, Ch. 168, L. 1965; amd. Sec. 1, Ch. 215, L. 1967; amd. Sec. 1, Ch. 294, L. 1967; amd. Sec. 2, Ch. 296, L. 1967; amd. Sec. 1, Ch. 292, L. 1969; amd. Sec. 1, Ch. 305, L. 1969; amd. Sec. 1, Ch. 35, L. 1971; amd. Sec. 1, Ch. 312, L. 1971; amd. Sec. 1, Ch. 317, L. 1971; amd. Sec. 1, Ch. 354, L. 1971; amd. Sec. 2, Ch. 266, L. 1973; amd. Sec. 2, Ch. 361, L. 1973; amd. Sec. 1, Ch. 405, L. 1973; amd. Sec. 1, Ch. 489, L. 1973; amd. Sec. 1, Ch. 223, L. 1974; amd. Sec. 2, Ch. 376, L. 1974.

Compiler's Notes

This section was amended twice in 1974, once by Ch. 223 and once by Ch. 376. Neither amendatory act mentioned or incorporated the changes made by the other. Since the amendments do not ap-

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84-404. State department of revenue to assign percentage basis, when. The percentage basis of true and full value as provided for in section 84-302, shall be determined and assigned by the state department of revenue, when it makes its annual assessment of the property, which it is required to assess under the laws of this state and shall transmit such determination and assignment to the various county cleraks with the assessments so made, and its determination shall be final except as to the right of review in the proper court.

84-406. Time of assessment — motor vehicles — mobile homes — livestock — snowmobiles. (1) The department of revenue or its agent must, between the first Monday of March and the second Monday of July in each year, ascertain the names of all taxable inhabitants, and assess all property in each county subject to taxation, except such as is required to be assessed by the state department of revenue, and must assess such property to the persons by whom it was owned or claimed, or in whose possession or control it was at 12 midnight of the first Monday of March next preceding. It must also ascertain and assess all mobile homes arriving in his [each] county after 12 midnight of the first Monday of March next preceding. The procedure provided by this section shall not apply to:

(a) Motor vehicles which are required by subdivision (2) hereof to be assessed as of the first day of January; but no mistake in the name of the owner or supposed owner of real property renders the assessment thereof invalid.

(b) Livestock being fed in feeding pens or enclosures which may by subdivision (3) of this section be assessed on an average inventory basis. Credits must be assessed as provided in section 84-101, subdivision 6.

(c) Property defined in section 53-642 as "special mobile equipment" shall be subject to assessment of personal property taxes either on the date that application is made for a special mobile equipment plate, if that date falls between the first day of January and the first Monday of March, or on the first Monday of March.

(d) Mobile homes held by a distributor or dealer of mobile

homes as a part of his stock in trade.

(e) Snowmobiles and campers which are required by subdivision 4 hereof to be assessed as of the first day of January.

(2) The department or its agent must ascertain and assess all motor vehicles, except mobile homes, in each county subject to taxation as of January 1 in each year, and the same shall be assessed to the persons by whom owned or claimed, or in whose possession or control such vehicle was at 12 midnight of the first day of January in each year. Provided that such tax shall not be assessed against motor vehicles which constitute inventory of motor vehicle dealers as of January 1, but said vehicles, and all other motor vehicles brought into the state subsequent to January 1, as motor vehicle dealer's inventory, shall be assessed to their respective purchasers as of the dates said vehicles are registered by said purchasers, and purchasers means and includes dealers who apply for registration of re-registration of motor vehicles, except as otherwise provided by section 32-3315. Goods, wares and merchandise of motor vehicle dealers, other than new motor vehicles and new mobile homes, shall continue to be assessed at full and true value as of the first Monday of March.

Except that this paragraph shall not apply to an applicant for registration or re-registration of a mobile home, nothing herein contained shall relieve the applicant for registration or re-registration of any other motor vehicle so assessed or subject to assessemtn of the duty of paying taxes thereon as a condition precedent to registration or re-registration in the event said taxes have not been paid by any prior applicant or owner in all cases where required to be paid.

(3) The assessed value of livestock being fed in feeding pens or enclosures on the first Monday in March may be computed by adding the value of livestock more than six (6) months of age being fed on the last day of each month since the last assessment date and dividing the sum by twelve (12).

(4) The department of revenue or its agent must ascertain and assess all snowmobiles and campers in his [each] county subject to taxation as of January 1 in each year, and the same shall be assessed to the persons by whom owned or

claimed, or in whose possession or control such snowmobile or camper was at 12 M of the first day of January in each year; provided, however, that snowmobiles and campers which constitute inventory of snowmobile dealers and camper dealers shall be assessed to the dealers as of 12 M of the first Monday of March in each year.

84-409. Statement — what to contain. The department of revenue or its agent must require from each person a statement under oath setting forth specifically all the real and personal property owned by such person, or in his possession, or under his control at twelve o'clock m. on the first Monday in March. Such statement must be in writing, showing separately:

1. All property belonging to, claimed by, or in the possession, or under the cntrol or management of such person.

2. All property belonging to, claimed by, or in the possession, or under the control or management of any firm of which such person is a member.

3. All property belonging to, claimed by, or in the possession, or under the control or management of any corporation of which such person is president, secretary, cashier, or managing agent.

4. The county in which such property is situated, or in which it is liable to taxation, and (if liable to taxation in the county in which the statement is made) also the city, town, school district, road district, or other revenue districts in which it is situated.

5. An exact description of all lands in parcels or subdivisions, not exceeding six hundred and forty acres each, and the sections and fractional sections of all tracts of land containing more than six hundred and forty acres which have been sectionized by the United States government; improvements, and personal property, including all vessels, steamers, and other watercraft, and all taxable state, county, city, or other municipal or public bonds, and the taxable bonds of any person, firm, or corporation, and deposits of money, gold dust, or other valuables, and the names of the persons with whom such deposits are made, and the places in which they may be found; all mortgages, deeds of

trust, contracts, and other obligations by which a debt is secured, and the property in the county affected thereby.

6. All solvent credits, secured or unsecured, due or owing to such person or any firm of which he is a member, or due or owing to any corporation of which he is president, secretary, cashier, or managing agent.

Whenever one member of a firm, or one of the proper officers of a corporation, has made a statement showing the property of the firm or corporation, another member of the firm, or another officer, need not include such property in the statement made by him; but this statement must show the name of the person or officer who made the statement in which such property is included.

7. All depots, shops, stations, buildings, and other structures erected on the space covered by the right of way, and all other property owned by any person, corporation, or association of persons, owning or operating any railroad within the county.

The fact that such statement is not required, or that a person has not made such statement under oath, or otherwise, does not relieve this property from taxation.

84-410. Department of revenue to furnish blanks, etc. The department of revenue must furnish its agents with blank forms of the statements provided for in the preceding section, affixing thereto an affidavit, which must be substantially as follows "I, ..., do swear that I am a resident of the county of ..... (naming it), and that my post-office address is .....; that the above list contains a full and correct statement of all property subject to taxation, which I, or any firm of which I am a member, or any corporation, association, or company of which I am president, cashier, secretary, or managing agent, owned, claimed, possessed, or controlled at twelve o'clock m. on the first Monday in March last, and which is not already assessed this year; and that I have not in any manner whatsoever transfeered or disposed of any property, or placed any property out of said county or my possession for the purpose of avoiding any assessment upon the same, or of making this statement; and

that the debts therein stated as owing by me are justly due and owing to others." The affidavit to the statement on behalf of a firm or corporation must state the principal place of business of the firm or corporation, and in other respects must conform substantially to the preceding form. The time when taxes become delinquent, and the time of the meeting of the county tax appeal board, must be stated in such form.

tained in and hereafter mined, produced, extracted, or otherwise taken" supported finding that such reservation was royalty interest. Superior Oil Co. v. Vanderhoof, 307 F Supp 84.

CHAPTER 42—COLLECTION OF PERSONAL PROPERTY TAXES NOT A LIEN ON REAL ESTATE—ROAD AND POOR TAXES

Section
84-4201. Duty of department of revenue or its agent.
84-4202. Duty of treasurer.
84-4211. Department of revenue or its agents to note report of property.

84-4201. (2238) Duty of department of revenue or its agent. It shall be the duty of the department of revenue or its agent, upon discovery of any personal property in the county, the taxes upon which are not a lien upon real property sufficient to secure the payment of such taxes, to immediately, and in any event not more than five days thereafter, make a report to the treasurer, setting forth the nature, kind, description and character of such property in such a definite manner that the treasurer can identify the same, the amount and assessed valuation of such property, where the same is located, the amount of taxes due thereon, and the name and address of the owner, claimant, or other person in possession of the same. Where such personal property is located in any city or town, which shall have provided by ordinance for the collection of its taxes for general, municipal and administrative purposes by its city or town treasurer, also and at the same time furnish to said city or town treasurer a duplicate of such notice to the county treasurer. For the purpose of determining the taxes due on such personal property, the department or its agent must use the levy made during the previous year.

History: En. Sec. 1, Ch. 119, L. 1903; re-en. Sec. 2683, Rev. C. 1907; re-en. Sec. 2238, R. C. M. 1921; amd. Sec. 1, Ch. 102, L. 1923; amd. Sec. 1, Ch. 94, L. 1925; amd. Sec. 1, Ch. 143, L. 1929; amd. Sec. 1, Ch. 6, L. 1939; amd. Sec. 1, Ch. 136, L. 1943; amd. Sec. 1, Ch. 23, L. 1951; amd. Sec. 82, Ch. 405, L. 1973. Cal. Pol. C. Sec. 3820.

Amendments

The 1973 amendment substituted "department of revenue or its agent" for "assessor" near the beginning of the first sentence and in the third sentence; and deleted "in his opinion" before "a lien upon real property" near the beginning of the first sentence.

84-4202. (2239) Duty of treasurer. The county treasurer must collect taxes on all personal property, and in the case provided in the preceding section, it shall be the duty of the treasurer immediately upon receipt of the report prescribed by section 84-4201, R. C. M. 1947, to notify the person or persons against whom the tax is assessed that the amount of such tax is due and payable at the county treasurer's office. The county treasurer must, at the time of receiving the report, and in any event within thirty (30) days from the receipt of such report, levy upon and take into his possession such personal property against which a tax is assessed, or any other personal property in the hands of the delinquent taxpayer, and proceed to sell the same, in the same manner as property is sold on execution by the sheriff, and the county treasurer may for the purpose of making such levy and sale, direct the sheriff to make such levy and sale, and the sheriff, undersheriff, or any deputy sheriff of such county is, ex officio, a deputy county treasurer for such purposes, and either may act and receive payment of such taxes. Such sheriff shall be entitled to receive the same fees as he is entitled to in making a seizure and sale under execution.

The county treasurer and his sureties are liable on his official bond for all taxes on personal property remaining uncollected by reason of the willful failure and neglect of such treasurer to levy upon and sell such personal property for the taxes levied thereon.

The tax on such personal property may be collected and the payment thereof enforced by the seizure and sale of any personal property in the possession of the person assessed at any time after the date the assessment is made or by the institution of a civil action for its collection in any court of competent jurisdiction; provided, however, that a resort to any one of the methods as herein provided for, shall not bar the right to resort to either or both of the other methods, but that any or all of the methods herein provided for may be used until the full amount of such tax is collected.

The county shall have a general lien, dependent on possession, upon any moneys in its possession belonging to any taxpayer, for any amounts due said county for any delinquent personal property taxes not a lien on real estate, of said taxpayer; provided, however, that due notice must be given the lien holder, if any.

History: En. Sec. 1, Ch. 119, L. 1903; re-en. Sec. 2684, Rev. C. 1907; re-en. Sec. 2239, R. C. M. 1921; amd. Sec. 2, Ch. 102, L. 1923; amd. Sec. 1, ch. 107, L. 1939; amd. Sec. 2, Ch. 23, L. 1951; amd. Sec. 1, Ch. 166, L. 1955; amd. Sec. 1, Ch. 165, L. 1963; amd. Sec. 83, Ch. 405, L. 1973. Cal. Pol. C. Sec. 3821.

Amendments

The 1973 amendment substituted "report prescribed by section 84-4201, R. C. M. 1947," for "report from the assessor" near the end of the first sentence in the first paragraph; and deleted "assessor's" following "at the time of receiving the" near the beginning of the second sentence in the first paragraph.

84-4211. (2251) **Department of revenue or its agent to note report of property.** The department of revenue or its agent must note on the assessment book opposite the names of each person owning, claiming, or possessing such personal property which may be so reported by him to the treasurer, the fact that such report was made to the treasurer, and the date when the same was so made.

History: En. Sec. 1, Ch. 119, L. 1903; re-en. Sec. 2690, Rev. C. 1907; re-en. Sec. 2251, R. C. M. 1921; amd. Sec. 84, Ch. 405, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue or its agent" for "assessor" at the beginning of the section.

CHAPTER 44—SETTLEMENT WITH STATE AUDITOR AND TREASURER

84-4403 to 84-4405. (2265 to 2267) **Repealed.**

Repeal

These sections (Secs. 4000 to 4002, Pol. C. 1895), relating to examination of tax collectors' books, were repealed by Sec. 23, Ch. 249, Laws 1967.

CHAPTER 45—PROTEST PAYMENT OF TAXES—ACTION TO RECOVER

Section
84-4502. Payment of taxes under protest—action to recover.
84-4503. Assessment for taxation—increase over statement of owner.

84-4502. (2269) **Payment of taxes under protest—action to recover.** (1) In all cases of levy of taxes, licenses or other demands for public

History: En. Sec. 2, Ch. 58, L. 1939; amd. Sec. 204, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department of revenue" for "board" at the beginning of the section.

CHAPTER 56—CIGARETTE TAX—LICENSES—STAMPS

Section
84-5606. The tax.
84-5606.2. Definitions.
84-5606.3. Wholesaler's and retailer's licenses—multiple places of business—application forms.
84-5606.4. Vending machines not places of business per se—reports.
84-5606.5. Wholesaler's and retailer's license fees—renewal—display of license.
84-5606.6. Disposition of license fees—appropriations—transfer to general fund—justification of expenses.
84-5606.7. Affixing of insignia.
84-5606.8. Revocation or suspension of license—hearing and appeal—duration—sale of cigarettes after revocation or suspension a misdemeanor—forfeiture.
84-5606.9. Unlawful acts when license not current and valid—sales to licensed wholesalers, subjobbers, retailers and cigarette vendors only—misdemeanor—forfeiture.
84-5606.10. Tax imposed by section 84-5606.
84-5606.11. Only licensed wholesalers and retailers to affix insignia.
84-5606.12. Purchase of insignia at discount to defray costs—defrayment inapplicable to certain portion of tax.
84-5606.13. Use of tax meter machine authorized—insignia to be approved—marking of imported packages of cigarettes required—supervision of machines—charge—report.
84-5606.14. Resale of insignia prohibited—unused meter settings.
84-5606.15. Payment for insignia or affixation within thirty days—bond—new licensees to pay cash.
84-5606.16. Proceedings upon failure or refusal to pay tax—penalty.
84-5606.17. Tax meter users to keep certain records—examination of records.
84-5606.18. Sale and use of cigarettes a misdemeanor if insignia requirements not met.
84-5606.19. Place where violations committed deemed a nuisance.
84-5606.20. Shipments or deliveries into or out of state to be reported by carrier—form and contents of report.
84-5606.21. Transportation of cigarettes without insignia a misdemeanor unless in interstate commerce—vehicle, cigarettes and equipment subject to seizure and forfeiture.
84-5606.22. Inventory of seized property—application for return of property.
84-5606.23. Investigations, inquiries and hearings authorized—testimony under oath—subpoena powers—finding and order to be made and filed.
84-5606.24. Hearing or rehearing before state tax appeal board.
84-5606.25. Appeal to district court—notice of appeal—perfecting appeal within thirty days—bond—hearing date.
84-5606.26. Department's duties and powers—arrest, entry of complaint and lawful search and seizure authorized.
84-5606.27. Promulgation of rules and regulations.
84-5606.28. County attorneys and peace officers to assist in enforcement of act—appointment of additional assistants and division authorized—presumption of violation.
84-5606.29. Department entitled to sue for unpaid tax and costs—treble damages.
84-5606.30. Employment of clerical and field assistants—disposition of taxes—war veterans' compensation fund abolished.
84-5606.31. Violation of act a misdemeanor unless otherwise provided—penalties.

84-5601 to 84-5605. Repealed.

Repeal

Sections 84-5601 to 84-5605 (Secs. 1 to 5, Ch. 289, L. 1947; Secs. 1, 2, Ch. 18, L. 1957), relating to licensing of cigarette dealers and distributors, were repealed by Sec. 32, Ch. 140, Laws 1969.

84-5606. The tax. (1) All taxes paid pursuant to the provisions of this section shall be conclusively presumed to be direct taxes on the retail

consumer precollected for the purpose of convenience and facility only. When the tax is paid by any other person such payment shall be considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user. Any person selling cigarettes at retail shall state or separately display in the licensed premises a notice of the tax included in the selling price and charged or payable pursuant to this section. The provisions of this subdivision shall in no way affect the method of collection of such tax as provided by this section.

(2) From and after the effective date of this amendatory law, there is hereby levied, imposed and assessed, and there shall be collected and paid to the state of Montana, upon cigarettes sold or possessed in this state, the following excise tax which shall be paid prior to the time of sale and delivery thereof, to wit: Nine cents (9¢) on each package containing not more than twenty (20) cigarettes, and when packages shall contain more than twenty (20) cigarettes, then nine cents (9¢) on each twenty (20) or fraction of twenty (20) cigarettes contained in such package.

(3) From and after the effective date of this amendatory law there is hereby levied, imposed and assessed, and there shall be collected and paid to the state of Montana, upon cigarettes sold or possessed in this state, the following excise tax, in addition to the excise tax on cigarettes, levied, imposed and assessed by subdivision (2) of this section 84-5606, an additional tax which shall be paid prior to the time of sale and delivery of such cigarettes, to wit:

Two cents (2¢) on each package containing not more than twenty (20) cigarettes, and when packages shall contain more than twenty (20) cigarettes, then two cents (2¢) on each twenty (20) or fraction of twenty (20) cigarettes contained in such package; which additional tax shall continue in force until the payment and retirement of all bonds of the state of Montana, and the payment of interest thereon, issued under the authority of said Initiative No. 54 as amended, for the purpose of paying an honorarium to the residents of Montana who were in military service in the military forces of the United States in World War II, the Korean War, or World War I, and until the payment and retirement of all long-range building program bonds issued under the provisions of Title 79, chapter 22, of the Revised Codes of Montana, 1947.

(4) From and after the effective date of this amendatory act of the thirty-eighth legislative assembly of the state of Montana, there is hereby levied, imposed and assessed, and there shall be collected and paid to the state of Montana, upon cigarettes sold or possessed in this state, the following excise tax, in addition to the excise tax on cigarettes, levied, imposed and assessed by subdivisions (2) and (3) of this section 84-5606, an additional tax which shall be paid prior to the time of sale and delivery of such cigarettes, to wit:

One cent (1¢) on each package containing not more than twenty (20) cigarettes, and when packages shall contain more than twenty (20) cigarettes, then one cent (1¢) on each twenty (20) or fraction of twenty (20) cigarettes contained in such package; which additional tax shall continue in force until the payment and retirement of the additional bonds of the

152

state of Montana authorized by amendatory acts of the thirty-fifth and thirty-eighth legislative assemblies, and the payment of the interest thereon and until the payment and retirement of all long-range building program bonds issued under the provisions of Title 79, chapter 22, of the Revised Codes of Montana, 1947.

(5) Within seventy-two (72) hours after receipt by the distributor or dealer of any such cigarettes, except as hereinafter provided, he shall cause to be securely affixed thereto, the required insignia denoting the tax thereon. Said insignia shall be properly canceled prior to sale or removal for consumption under such regulations as the board may prescribe. Each package shall have the required insignia to affix thereto in such a manner that the insignia will be destroyed when the package is opened. Every person who shall make, alter, forge or counterfeit any license stamp or insignia provided for in this law, or who shall assist or be concerned therein, or who shall have in his possession any altered, forged, counterfeit or spurious stamp, license or insignia, with intent to defraud the state, is guilty of forgery, and shall be punished by imprisonment in the state prison for not less than one (1) year or more than fourteen (14) years.

History: En. Sec. 6, Ch. 289, L. 1947; amd. Sec. 16, Initiative No. 54 (L. 1951, p. 781); amd. Sec. 1, Ch. 123, L. 1953; amd. Sec. 3, Ch. 18, L. 1957; amd. Sec. 7, Ch. 44, L. 1957; amd. Sec. 1, Ch. 222, L. 1957; amd. Sec. 1, Ch. 97, L. 1963; amd. Sec. 6, Ch. 270, L. 1963; amd. Sec. 5, Ch. 318, L. 1967; amd. Sec. 4, Ch. 222, L. 1971.

Amendments

The 1967 amendment added "and until the payment * * * Revised Codes of Montana, 1947" at the end of the second paragraph of subdivision (3), and after "interest thereon" in the second paragraph of subdivision (4), substituted the same phrase for "and the payment of the expenses of administration of the amendatory act."

The 1971 amendment increased the tax specified in subsection (2) from five cents to nine cents per package and made minor changes in style.

Referendum Result

Section 1 of Ch. 318, Laws 1967, read: "It is determined that the electors of the state at the general election held in November, 1966, approved the levy and collection of the three-cent (3¢) per package cigarette tax authorized by section 84-5606, subdivisions (3) and (4), R. C. M. 1947, for the purpose of financing the cost of constructing and remodeling state buildings; this referendum measure having been presented at said election in the manner directed by chapter 264 of the Session Laws of the thirty-ninth legislative assembly, and having been approved by a majority of the electors voting on the question; and that it is now necessary to establish the procedure by which said referendum may be made effective."

INITIATIVE MEASURE NO. 54 AMENDMENTS

Section 9 of chapter 270 of the 1963 Session, which amended Initiative Measure No. 54 (Laws 1951, pp. 781 to 790) was amended by section 1 of chapter 112 of the 1967 Session. Section 1 of chapter 112 of the 1967 Session was amended by section 1 of chapter 236 of the 1969 Session; Section 9 of the act now reads:

Chapter 270, Laws 1963; amd. Chapter 112, Laws 1967; amd. Chapter 236, Laws 1969.

Section 9. Claims for benefits under the provisions of subdivision (1) of section 2, and/or under section 3 of said Initiative No. 54, as by this amendatory act amended, may be filed at any time before the expiration of five (5) years and six (6) months from and after the January first next following the date of the passage and approval of this act, provided, however, that said period of five (5) years and six (6) months shall be extended for a period equal to the period, or the aggregate of the periods, of the time during which the administration of this act shall be suspended, by reason of litigation or from any other cause.

[The remainder of Ch. 112, Laws 1967 read as follows:

"Section 2. All acts and parts of acts in conflict herewith are hereby repealed.

"Section 3. This act shall be in full force and effect upon its passage and approval." Approved February 21, 1967.]

153

84-5606.2. Definitions. As used in this act the following definitions shall apply unless the context otherwise requires:

(a) The word "department" shall mean the state department of revenue of the state of Montana.

(b) The word "person" shall mean any individual, firm, fiduciary, partnership, corporation, trust, organization or association however formed.

(c) "Cigarettes" shall mean any roll for smoking made wholly or in part of tobacco, irrespective of size or shape and whether or not such tobacco is flavored, adulterated or mixed with any other ingredient, the wrapper or cover of which is made of nontobacco paper, or any other substance or material except tobacco.

(d) The words "insignia" or "indicia" shall mean the impression or mark approved by the state department of revenue, under the provisions of this act.

(e) The words "full face value of insignia" shall mean the total amount of the tax levied under this act.

(f) The words "public warehouses" shall mean agents or representatives of manufacturers who receive cigarettes in carload lots for distribution to wholesaler and retailers in original cases.

(g) The word "wholesaler" shall mean and include any person resident in this state who brings or causes to be brought into this state unstamped cigarettes purchased directly from the manufacturers thereof and stores, sells, or otherwise disposes of the same after they shall reach this state; and also any person who, within this state, manufactures or produces, directly or indirectly, cigarettes and sells or distributes the same within this state.

(h) The words "licensed wholesaler" shall mean a wholesaler duly licensed under the provisions of this act.

(i) The words "cigarette vendor" shall mean and include any person, company or corporation, doing business in the state, who purchases cigarettes through a wholesaler for ten (10) or more cigarette vending machines, which he operates for a profit in premises or locations other than his own: Such person, company or corporation shall be treated as a wholesaler. Any person, company, corporation or fraternal organization who operates less then ten (10) cigarette vending machines shall be treated as a retailer.

(j) The word "retailer" shall mean any person other than a wholesaler, who is engaged in the business of selling cigarettes at retail.

(k) The words "licensed retailer" shall mean any person other than a wholesaler, who is duly licensed under the provisions of this act.

(l) The words "sale" and "sell" shall mean and include any transfer of cigarettes by sale, as defined by section 87A-2-106, R. C. M. 1947, or by gift, barter or exchange.

History: En. Sec. 1, Ch. 140, L. 1969; amd. Sec. 205, Ch. 516, L. 1973.

Title of Act

An act repealing sections 84-5601, 84-5602, 84-5603, 84-5604, 84-5605, 84-5607, 84-5608, 84-5609, 84-5610, 84-5611, 84-5612, 84-5613, 84-5614, 84-5615, 84-5616, 84-5617, 84-5618, 84-5619, 84-5620, 84-5621, 84-5622, and 84-5623, R. C. M. 1947, and providing for annual license fees and for annual licensing of wholesalers and retailers of cigarettes, and for the payment of the costs of enforcement of state cigarette laws; and providing procedures for the collection of the tax imposed by section 84-5606, R. C. M. 1947; and providing for penalties for violations of this act, and providing for the administration of this act; and providing revenue for the general fund of the state of Montana.

Amendments

The 1973 amendment substituted subdivision (a) for a subdivision defining "board" as the state board of equalization; and substituted "department of revenue" for "board of equalization" in subdivision (d).

Cross-References

Multistate tax compact, sec. 84-6701.

84-5606.3. Wholesaler's and retailer's licenses—multiple places of business—application forms. Every wholesaler or retailer shall obtain a license from the department before engaging in the business of wholesaler or retailer. A separate application and a separate license shall be required for each place of business owned, controlled or operated by such wholesaler or retailer within the state of Montana. Application forms shall require the type and general description of applicant organizations, names and home addresses of all known owners, state whether or not principals of such organization have been convicted of a felony and identify each such individual, and such other pertinent information as the board may require in regularly promulgated regulations.

History: En. Sec. 2, Ch. 140, L. 1969; amd. Sec. 206, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in the first sentence.

84-5606.4. Vending machines not places of business per se—reports. Cigarette vending machines shall not be considered as places of business per se but a report of each and all machines shall be made on forms prescribed by the department, which shall state the name and address of the cigarette vendor, the assigned location of each machine with best machine identification available, type of business, and such other information as the board may require for proper administration of this act.

History: En. Sec. 3, Ch. 140, L. 1969; amd. Sec. 207, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" near the middle of the section.

84-5606.5. Wholesaler's and retailer's license fees—renewal—display of license. Each application for a wholesaler's license shall be accompanied by a fee of fifty dollars ($50) effective July 1, 1969. Each application for a retailer's license shall be accompanied by a fee of five dollars ($5) effective July 1, 1969. These licenses shall be renewed annually upon payment of the annual fee in the amount set forth above, and shall be effective for one year, without proration. Each license shall be prominently displayed on the licensed premises, and a separate license shall be displayed at each place of business owned, controlled or operated by such wholesaler or retailer.

History: En. Sec. 4, Ch. 140, L. 1969.

84-5606.6. Disposition of license fees—appropriations—transfer to general fund—justification of expenses. All license fees collected under the

provisions of this act shall be deposited monthly with the state treasurer in the department's cigarette enforcement account in the earmarked revenue fund. There shall be appropriated to the department, from said cigarette enforcement account, such sum as may be necessary to comply with the provisions of this act for the fiscal biennium ending June 30, 1971. On or before June 30, 1971, the department shall pay to the state treasurer to the credit of the state general fund, all funds in excess of seven thousand five hundred dollars ($7,500) in said cigarette enforcement account, not needed for the administration of this act.

For the biennium beginning July 1, 1971, and each biennium thereafter, there shall be appropriated to the board a sum deemed justified and reasonable to operate the department's cigarette enforcement division, providing that after payment of all pending and known expenses, all sums so appropriated in excess of seven thousand five hundred dollars ($7,500) not needed for the administration of this act, shall be transferred to the state general fund to be available for general fund purposes. Such transfer shall be made within fifteen (15) days of the last day of the biennium.

All expenses charged against said cigarette enforcement account shall be justified by itemized claims coupled with standard accounting reports.

History: En. Sec. 5, Ch. 140, L. 1969; amd. Sec. 208, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted references to the department of revenue for references to the state board of equalization in four places.

84-5606.7. Affixing of insignia. Wholesalers and retailers licensed under this act may buy, sell or have in their possession only cigarettes which have the insignia provided for in this act on each package. The insignia provided for in this act shall be sold to, and affixed by, licensed wholesalers and licensed retailers only.

History: En. Sec. 6, Ch. 140, L. 1969.

84-5606.8. Revocation or suspension of license—hearing and appeal—duration—sale of cigarettes after revocation or suspension a misdemeanor—forfeiture. The department may revoke or suspend the license of any wholesaler or retailer for failure to comply with any provision of this act or of the Unfair Cigarette Sales Act (sections 51-301 through 51-314, R. C. M. 1947), and with any lawful rule or regulation of the department made pursuant to said laws. Any person aggrieved by such revocation or suspension may apply to the department for a hearing which shall be open to the public, and may further appeal to the court, as hereinafter provided. When a license has been duly revoked, no license shall again issue to such licensee for a period of one (1) year thereafter. When a license has been duly suspended, the suspension may be for any period not to exceed one (1) year. Any person who shall sell cigarettes after his license has been revoked or suspended is guilty of a misdemeanor, and shall be punished as hereinafter provided, and all cigarettes in his possession shall be seized and forfeited to the state.

History: En. Sec. 7, Ch. 140, L. 1969; amd. Sec. 209, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in three places.

84-5606.9. Unlawful acts when license not current and valid—sales to licensed wholesalers, subjobbers, retailers and cigarette vendors only—misdemeanor—forfeiture. No person shall sell, offer to sell, or possess with intent to sell, any cigarettes, at wholesale or retail unless his license is current and valid, under the provisions of this act. No person shall sell, offer to sell or possess with intent to sell, any cigarettes, at wholesale or retail, to a resident or nonresident wholesaler, subjobber, retailer or vendor who is not licensed under this act or who is not licensed by the state in which he sells, offers to sell or intends to sell cigarettes. Any person violating the provisions of this section is guilty of a misdemeanor, and shall be punished as hereinafter provided, and all cigarettes in his possession shall be seized and forfeited to the state.

History: En. Sec. 8, Ch. 140, L. 1969; amd. Sec. 1, Ch. 319, L. 1973.

Amendments

The 1973 amendment inserted the second sentence.

Effective Date

Section 2 of Ch. 319, Laws 1973 provided the act should be in effect from and after its passage and approval. Approved March 15, 1973.

84-5606.10. Tax imposed by section 84-5606. The tax referred to in this act shall mean the tax imposed by section 84-5606, R. C. M. 1947. The full face value of the insignia or tax shall be added to the cost of the cigarettes and recovered from the ultimate consumer or user.

History: En. Sec. 9, Ch. 140, L. 1969.

84-5606.11. Only licensed wholesalers and retailers to affix insignia. Insignia shall be affixed to packages of cigarettes only by licensed wholesalers and licensed retailers.

History: En. Sec. 10, Ch. 140, L. 1969.

84-5606.12. Purchase of insignia at discount to defray costs—defrayment inapplicable to certain portion of tax. Every licensed wholesaler and licensed retailer shall be entitled to purchase said insignia at full face value less eight per cent (8%) of the face value, upon payment therefor, as defrayment of the costs of affixing insignia and precollecting such tax on behalf of the state of Montana. This defrayment is not applicable to that portion of the tax collected for any veterans' honorarium or long-range building program.

History: En. Sec. 11, Ch. 140, L. 1969.

Calculating Wholesale Price

Despite provisions of this section for discount to wholesalers in purchasing tax insignia, the full face value of the insignia is to be used in calculating wholesale cigarette price under section 51-301, so that board of equalization formula reducing wholesale cost by discount became improper with enactment of chapter 140 of 1969 Laws. Montana Assn. of Tobacco & Candy Distributors v. State Board of Equalization, 156 M 108, 476 P 2d 775.

84-5606.13. Use of tax meter machine authorized—insignia to be approved—marking of imported packages of cigarettes required—supervision of machines—charge—report. The department of revenue may authorize any wholesaler or retailer of cigarettes licensed under this act to use a tax meter machine with which to imprint an insignia upon each package of cigarettes imported, sold or delivered in this state. The insignia shall be one approved by the department. Each package of cigarettes imported

into this state, delivered or sold therein shall be marked with the proper insignia of such tax-stamping meter and thereafter any original package of cigarettes so marked may be lawfully possessed and sold within the state by any wholesaler or retailer licensed under this act. The department shall supervise and check the operation of such tax meter machines. The operator of such machine before using the same, shall take the meter thereof to the county treasurer, of the county in which the machine is operated, who is authorized to, and shall set said meter for the number of packages specified and required by the operator. Prior to setting said meter the county treasurer shall charge said operator the amount of money proper for said setting, less the expense defrayment of eight per cent (8%) provided for in section 11 [84-5606.12]. The county treasurer shall collect this amount in advance unless the board has allowed the purchaser credit as provided in section 14 [84-5606.15]. The county treasurer shall report to the department on forms prescribed by it, the name of the licensed wholesaler or licensed retailer and the number of packages for which said meter was set and shall forward to the department any amounts collected from said licensee.

History: En. Sec. 13, Ch. 140, L. 1969; amd. Sec. 210, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted references to the department of revenue for references to the state board of equalization in five places.

84-5606.14. Resale of insignia prohibited—unused meter settings. No wholesaler or retailer shall resell to any other wholesaler or retailer any insignia purchased by him from the department. Any wholesaler or retailer who has on hand any meter settings at the time of discontinuing his business of selling cigarettes, may apply to the department and be paid the face value of said meter settings less the amount of the expense defrayment allowed by section 11 [84-5606.12].

History: En. Sec. 13, Ch. 140, L. 1969; amd. Sec. 211, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in two places.

84-5606.15. Payment for insignia or affixation within thirty days—bond—new licensees to pay cash. The department shall permit a licensed wholesaler or licensed retailer to pay for the insignia purchased, or affixation of insignia, within thirty (30) days after the date of purchase and shall require such licensee to file with the department a bond issued by a surety company approved by the state department of insurance as to solvency and responsibility and authority to transact business in the state, for such amount as the department may fix, but not in excess of an amount equal to the maximum insignia purchases incurred for any thirty (30) day period in the previous calendar year; provided, however, that any newly licensed wholesaler or licensed retailer shall pay on a cash basis for one (1) complete calendar year, after which the department may permit him thirty (30) days to pay for the purchase or affixation of insignia and shall require a bond as hereinabove provided.

History: En. Sec. 14, Ch. 140, L. 1969; amd. Sec. 212, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in four places.

84-5606.16. Proceedings upon failure or refusal to pay tax—penalty. If any person fails or refuses to pay the tax required by this act when due, the department shall proceed to determine the tax due from such information as the department can obtain and shall assess the tax so determined against such person and notify him of the amount thereof. After such notice such tax shall become due and payable, together with a penalty of five per cent (5%) of such tax, or five dollars ($5) per day for each day after the date of such notice, whichever is greater.

History: En. Sec. 15, Ch. 140, L. 1969; amd. Sec. 213, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in two places in the first sentence.

84-5606.17. Tax meter users to keep certain records—examination of records. All tax meter users shall keep for a period of one (1) year, all invoices of cigarettes purchased and imported by them, all receipts issued by them and insignia purchased, also, an accurate record of all sales of cigarettes by such tax meter users, showing the name and address of each purchaser, the date of sale, the quantity of each kind sold, the name of any carrier, the shipping point and destination. Such tax meter users shall permit the department, its assistants, authorized agents or representatives to examine all taxable items of cigarettes, invoices, receipts, books, paper, memoranda and records, as may be necessary to determine whether the tax meter machine has been used as required, or the insignia required by this act had been purchased and used, or to determine the amount of such tax as may be due or unpaid.

History: En. Sec. 16, Ch. 140, L. 1969; amd. Sec. 214, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" near the beginning of the second sentence.

84-5606.18. Sale and use of cigarettes a misdemeanor if insignia requirements not met. Every person who sells any packages of cigarettes which does not bear the insignia required by this act, and every person who shall use or consume within this state, any cigarette, unless the same shall be taken from the original package having affixed thereto the insignia required by this act, is guilty of a misdemeanor and shall be punished as hereinafter provided.

History: En. Sec. 17, Ch. 140, L. 1969.

84-5606.19. Place where violations committed deemed a nuisance. Every person having possession or control of, or who maintains a building or place where cigarettes are sold in violation of this act, or permits the same to be done in any place or building possessed, controlled or maintained by him, is guilty of maintaining and keeping a nuisance and the building or place so used, together with the personal property and fixtures used in connection therewith shall be deemed a nuisance, and such person shall be enjoined and such building or place, personal property and fixtures abated as a nuisance, at the instance of the state.

History: En. Sec. 18, Ch. 140, L. 1969.

84-5606.20. Shipments or deliveries into or out of state to be reported by carrier—form and contents of report. Every common carrier hauling, transporting or shipping into or out of the state of Montana, from or to any other state, any cigarettes shall report in writing such shipments or deliveries to the department, on forms furnished by the department, giving the date, the person to whom the same was consigned and delivered and the quantity as shown by the bill of lading, and such other information as the department may require.

History: En. Sec. 19, Ch. 140, L. 1969; amd. Sec. 215, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in three places.

84-5606.21. Transportation of cigarettes without insignia a misdemeanor unless in interstate commerce—vehicle, cigarettes and equipment subject to seizure and forfeiture. It shall be unlawful for any person to transport into, receive, carry or move from place to place within this state, except in the course of interstate commerce, any cigarettes which do not bear the insignia required by this act. Any person violating the provisions of this section is guilty of a misdemeanor and shall be punished as hereinafter provided, and any motor vehicle, airplane, conveyance, vehicle or other means of transportation, in which cigarettes are being unlawfully transported, together with the cigarettes and other equipment or personal property used in connection with such transportation, and found in such means of transportation, shall be subject to seizure by the department, its duly authorized agent, or any sheriff or deputy, or other peace officer, and shall be subject to forfeiture in the manner hereinafter provided.

History: En. Sec. 20, Ch. 140, L. 1969; amd. Sec. 216, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" near the end of the section.

84-5606.22. Inventory of seized property—application for return of property. Upon the seizure of any cigarettes, and within two (2) days thereafter, the person or officer making such seizure shall deliver an inventory of the property seized to the person from whom such seizure was made, if known, and file a copy thereof with the department. The person from whom the seizure was made, or any other person claiming an interest in the property seized, may apply for its return as provided in sections 95-713 through 95-716, R. C. M. 1947.

History: En. Sec. 21, Ch. 140, L. 1969; amd. Sec. 217, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" at the end of the first sentence.

84-5606.23. Investigations, inquiries and hearings authorized—testimony under oath—subpoena powers—finding and order to be made and filed. The department and its duly authorized agents are empowered to conduct investigations, inquiries, and hearings hereunder, and any member thereof, or any agent, is authorized to administer oaths and take testimony under oath, relative to the matter of inquiry or investigation. The director,

or his authorized agent, may subpoena witnesses and require the production of books, papers and documents pertinent to such inquiry. The director, or his agent, after the hearing, shall make findings and an order, in writing, which findings and order shall be filed in the office of the department and open for public inspection.

History: En. Sec. 22, Ch. 140, L. 1969; amd. Sec. 110, Ch. 405, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" at the beginning and near the end of the section; and substituted "director, or his" for "board, or its" at the beginning of the second and third sentences.

84-5606.24. Hearing or rehearing before state tax appeal board. Any person aggrieved by any action of the department or its duly authorized agents, under the provisions of this act, may apply to the state tax appeal board, in writing, for a hearing or rehearing thereon within thirty (30) days after such action of the department or its authorized agents. The board shall promptly consider such application, set same for hearing and notify the applicant of the time and place fixed for such hearing or rehearing, which may be at its office or in the county of the applicant. After such hearing or rehearing, the board may make any further or other order in the premises, as it may deem proper and lawful and shall furnish a copy thereof to the applicant. The department, on its own initiative, may order a hearing on any matter concerned with the administration of this act, upon at least ten (10) days' notice in writing to the person or persons to be investigated.

History: En. Sec. 23, Ch. 140, L. 1969; amd. Sec. 111, Ch. 405, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in three places; and inserted "state tax appeal" before board in the middle of the first sentence.

84-5606.25. Appeal to district court—notice of appeal—perfecting appeal within thirty days—bond—hearing date. Any person aggrieved by any action or decision of the department, made under the provisions of this act, may appeal therefrom to the district court of the county where appellant resides, which appeal shall be taken by notice of appeal in writing, setting forth the actions or decisions of the department, of which the appellant is aggrieved. Such appeal shall be perfected within thirty (30) days after notice of any action or decision of the department, and shall be taken by serving a notice of appeal upon the department and filing the same with the clerk of said court, together with a good and sufficient bond to the state of Montana. The condition of such bond shall be to the effect that appellant agrees to prosecute said appeal diligently, and if the court shall finally decide that the state is entitled to judgment, that appellant will pay the amount thereof together with costs of such appeal. The bond shall be in the form required by law and in such an amount as the court may require. The notice of appeal shall be signed by the appellant or his attorney, and the matter appealed shall be heard upon ten (10) days' notice given by either party, unless a different time is specified by the court. Said district court may grant such relief as the law and the facts in the premises require.

History: En. Sec. 24, Ch. 140, L. 1969; amd. Sec. 218, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in four places.

84-5606.26. Department's duties and powers—arrest, entry of complaint and lawful search and seizure authorized. The department is charged with the duty of administering and enforcing the provisions of this act, and the director and his agents, are hereby given the powers of peace officers, and are authorized and empowered to arrest any person violating any provision of this act, and to enter complaint before any court of competent jurisdiction, and to lawfully search and seize and use as evidence, any unlawful or unlawfully possessed license, stamp or insignia found in the possession of any person or place.

History: En. Sec. 25, Ch. 140, L. 1969; amd. Sec. 112, Ch. 405, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" at the beginning of the section; and substituted "director and his agents" for "the board, its members and agents" near the middle of the section.

84-5606.27. Promulgation of rules and regulations. The department shall have the power and authority to prescribe all rules and regulations not inconsistent with the provisions of this act, for the detailed and efficient administration thereof. All such rules, regulations and orders promulgated shall be published promptly and a copy distributed to each wholesale licensee; be published cumulative annually, and maintained in full as a public record.

History: En. Sec. 26, Ch. 140, L. 1969; amd. Sec. 219, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" at the beginning of the section.

84-5606.28. County attorneys and peace officers to assist in enforcement of act—appointment of additional assistants and division authorized—presumption of violation. In the enforcement of this act, the department may call to its assistance, and it shall be the duty of any county attorney, or any peace officer, in this state, to assist the department in the enforcement of this act; and the board is hereby authorized to appoint such additional assistants, and to establish an additional division of cigarette enforcement, as may be required to carry out the provisions of this act. Whenever any cigarettes are found in the place of business of any unlicensed wholesaler, retailer or other person, without the insignia affixed and canceled, or not marked as having been received by the unlicensed wholesaler, retailer or person within the preceding seventy-two (72) hours the presumption shall be that such cigarettes are kept therein in violation of the provisions of this chapter.

History: En. Sec. 27, Ch. 140, L. 1969; amd. Sec. 220, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in two places.

84-5606.29. Department entitled to sue for unpaid tax and costs—treble damages. In the case of any violation of this chapter, the department shall be entitled to sue, in the district where the department main-

tains its principal office for the amount of the unpaid tax and costs, including reasonable expense of the department in effecting collection of the unpaid tax. Where the court finds the failure to pay the tax has been willful, the court must, in addition, assess damages in treble the amount of the tax found to be due.

History: En. Sec. 28, Ch. 140, L. 1969; amd. Sec. 221, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" in three places in the first sentence.

84-5606.30. Employment of clerical and field assistants—disposition of taxes—war veterans' compensation fund abolished. The department is hereby authorized to employ such clerical and field assistants as may be necessary to properly administer the provisions of this law. All moneys collected under the provisions of subdivision (2) of section 84-5606, less the expense of collecting all the taxes levied, imposed and assessed by said section 84-5606, shall be paid to the state treasurer and deposited as follows: fifty per cent (50%) in the general fund, fifteen per cent (15%) in the long-range building program account in the sinking fund, and thirty-five per cent (35%) in the long-range building program account in the bond proceeds and insurance clearance fund. All taxes levied, imposed and assessed under the provisions of subdivision (3) of said section 84-5606 shall, when collected, be paid to the state treasurer and credited to a subfund in the sinking fund and shall, while any of the bonds hereafter issued and sold for the purpose of paying an honorarium, or adjusted compensation, to the residents of Montana who were in military service in the military forces of the United States in World War I or World War II, or any of the interest thereon, remain unpaid, be available for the payment thereof.

All taxes levied, imposed and assessed under the provisions of subdivision (4) of said section 84-5606 shall, when collected, be paid to the state treasurer and credited to a subfund in the sinking fund, which shall, while any of the bonds hereafter issued and sold, in addition to the bonds authorized by said Initiative Measure No. 54, as originally enacted, or any of the interest upon such additional bonds, remain unpaid, be used only for the payment thereof, and of the expenses of administration of this act.

The War Veterans' Compensation Fund established by Initiative No. 54, as amended by chapter 44, Laws of 1957, is abolished and all moneys in the fund are transferred to a subfund in the bond proceeds and insurance clearance fund. When all veterans' honoraria authorized by law have been paid, such moneys shall be transferred to the two (2) accounts in the sinking fund established by this section.

After all of the outstanding War Veterans' Compensation Bonds and World War I Compensation Bonds have been paid or redeemed, or after the necessary funds have been set aside for their payment or redemption, the balance of the proceeds theretofore collected under the provisions of subdivisions (3) and (4) of said section 84-5606 shall be transferred to the sinking fund account provided for in section 79-2203, R. C. M. 1947.

History: En. Sec. 29, Ch. 140, L. 1969; amd. Sec. 5, Ch. 222, L. 1971; amd. Sec. 222, Ch. 516, L. 1973.

Amendments

The 1971 amendment substituted the provisions for apportionment at the end of the second sentence of the first paragraph for a provision requiring deposit in the general fund of all moneys collected under subdivision (2) of sec. 84-5606.

The 1973 amendment substituted "department" for "board" at the beginning of the section.

Effective Date

Section 6 of Ch. 222, Laws 1971 provided the act should be in effect from and after its passage and approval. Approved March 5, 1971.

84-5606.31. Violation of act a misdemeanor unless otherwise provided—penalties. Unless hereinbefore expressly otherwise provided, the violation of any provision of this act shall constitute a misdemeanor, and any person violating any such provision shall be punished by a fine of not less than one hundred dollars ($100), or more than five hundred dollars ($500), or by imprisonment in the county jail for not less than thirty (30) days or more than six (6) months, or by both such fine and imprisonment; and if such person is the holder of a license issued under this act, such license shall be revoked by the department for a period of one (1) year.

History: En. Sec. 30, Ch. 140, L. 1969; amd. Sec. 223, Ch. 516, L. 1973.

Amendments

The 1973 amendment substituted "department" for "board" near the end of the section.

Separability Clause

Section 31 of Ch. 140, Laws 1969 read "The provisions of this act shall be severable and if any of its provisions shall be held unconstitutional or void, the remainder of this act shall continue in full force and effect."

Repealing Clause

Section 32 of Ch. 140, Laws 1969 read "Sections 84-5601 through 84-5605, R. C. M. 1947, and sections 84-5607 through 84-5623, R. C. M. 1947, are repealed."

84-5607 to 84-5623. Repealed.

Repeal

Sections 84-5607 to 84-5623 (Secs. 7 to 23, Ch. 289, L. 1947; Sec. 16, Initiative No. 54, L. 1951, p. 781; Sec. 1, Ch. 123, L. 1953; Secs. 4 to 6, Ch. 18, L. 1957; Sec. 7, Ch. 44, L. 1957; Sec. 2, Ch. 222, L. 1957; Sec. 209, Ch. 147, L. 1963; Sec. 7, Ch. 270, L. 1963; Sec. 6, Ch. 318, L. 1967), relating to the administering of the cigarette tax, were repealed by Sec. 32, Ch. 140, Laws 1969.

CHAPTER 58—PRODUCTION CREDIT ASSOCIATIONS—TAXATION

Section
84-5801. Production credit associations—assessment and payment.

84-5801. Production credit associations—assessment and payment. Every production credit association organized under the provisions of section 1131d of title 12, United States Codes annotated shall be assessed for and pay taxes upon all real and personal property owned by such association, and also upon the moneyed capital employed in such business, such moneyed capital to be ascertained by deducting from the amount of loans, including loans secured by mortgage on real estate or personal property, the amount of such loans discounted, and any indebtedness representing money borrowed for use as moneyed capital. Said moneyed capital shall be taxed at the same rate and take the same

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1975
No. 75-50

CONFEDERATED SALISH & KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, et al., *Appellants*,
v.
MOE, et al., *Appellees*.

October Term, 1974
No. 74-1656

JOHN C. MOE, et al., *Appellants*,
v.
CONFEDERATED SALISH & KOOTENAI TRIBES
OF THE FLATHEAD RESERVATION, et al., *Appellees*.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MONTANA

BRIEF FOR THE STATES OF WASHINGTON AND IDAHO AS AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

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INDEX

	Page
I. INTEREST OF AMICI CURIAE	1
Interest of the State of Washington	1
Interest of the State of Idaho	5
II. ARGUMENT IN SUPPORT OF JURISDICTIONAL STATEMENTS	9
A. The appeal of the Confederated Salish and Kootenai Tribes, No. 75-50	9
B. The Appeal of the State of Montana, No. 74-1656	13
CONCLUSION	19
APPENDIX A	
APPENDIX B	

TABLE OF CASES

Agricultural Bank v. Tax Comm'n, 392 U.S. 339 (1968) ... 15
Board of Comm'rs v. Seber, 318 U.S. 705 (1943) 15, 18
Carson v. Roane-Anderson Company, 342 U.S. 232 (1952) . 15
Dameron v. Brodhead, 345 U.S. 322 (1953) 15
Mahoney v. State Tax Commission, 96 Idaho ....., 524 P.2d 187 8
McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 10, 11, 12, 19
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ... 10, 18
Morton v. Mancari, 417 U.S. 535 (1974) 13, 15, 16
Oklahoma Tax Comm'n v. U.S., 319, U.S. 598 (1943) 19
Tonasket v. State, 79 Wn.2d 607, 488 P.2d 281 (1971), 411 U.S. 451 (1973) 3, 5, 10
Tonasket v. State, 84 Wn.2d 164 (1974), 525 P.2d 744, app. dis. 420 U.S. 915 (1975) 12
U.S. v. Washington, 496 F.2d 620 (C.A. 9, 1974) 2

FEDERAL STATUTES

	Page
Public Law 83-280	3, 4, 8, 12
United States Code, Title 8, § 1401(a)(2)	14

IDAHO STATUTES

Idaho Code § 63-3619	9
Idaho Code § 67-5101	8

WASHINGTON STATUTES

RCW 37.12.010	3, 4
RCW 82.24.260	5
Chap. 22, Laws of 1975, 1st ex. sess.	4

OTHER AUTHORITIES

Department of Commerce, Federal and State Indian Reservations and Indian Trust Areas	1, 5, 6, 7
Hawley, Jess. 1920. History of Idaho. Vol. 1. Clark Pub. Co.	5

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE STATES OF WASHINGTON AND IDAHO AS AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENTS

I.

INTEREST OF AMICI CURIAE

Interest of the State of Washington

There are twenty-two Indian reservations within the State of Washington.[1] These reservations vary

[1]Department of Commerce, *Federal and State Indian Reservations and Indian Trust Areas*, pp. 531-577 (G.P.O. 1974)

greatly both in size and in the number of Indians living thereon.

At one end of the spectrum is the Yakima Reservation, consisting of approximately 1.1 million acres of tribally owned and allotted land.[1] There are approximately 5,000 enrolled members of the Yakima Nation.[2] At the other of the spectrum is the Puyallup Reservation, encompassing 33 acres of land,[3] most of which is used as an Indian cemetery and as a location for a cigarette shop. There are approximately 171 Indians residing on or near the reservation.[4] (While the original reservation consisted of 18,000 acres, and has not been terminated, *U. S. v. Washington*, 496 F.2d 620 (C.A. 9, 1974) all but the 33 acres have been alienated to non-Indians.)

Both of these reservations, however, share with each other, and with most of the twenty other reservations, a common characteristic: they are located in close proximity to major population centers and major highways. (See Appendix A, consisting of a BIA map, with principal highways emphasized by us.) Further, in the case of the two largest reservations, the Yakima Reservation and the Colville Reservation, the exterior boundaries of the reservation encompass sizable cities, with predominantly non-Indian populations.

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[2]Ibid, p. 575
[3]Ibid, p. 576
[4]Ibid, p. 556
[5]Ibid, p. 557

Thus, it is hardly surprising that there are approximately 65 Indian smoke shops located on 17 different reservations in the state of Washington. The present annual loss from these smoke shops in cigarette tax and retail sales tax is approximately $8 million.

As would be expected, the state of Washington is in litigation with most of the Indian tribes in the state on the question of the status of the tribe and its members under the cigarette tax, the retail sales tax, and other state excise taxes. A list of pending cases is attached hereto as Appendix B.

These tribes and the reservations they occupy generally fall into two categories, so far as the application of Public Law 83-280 is concerned. Approximately half of them fall into the category exemplified by the Colville Tribe on the Colville Reservation, which was involved in *Tonasket v. State*, 79 Wn.2d 607 (1971), 488 P.2d 281, judgment vacated, 411 US 451 (1973). The tribes in this category have requested that the state assume the full extent of jurisdiction permissible under PL 83-280, and the state has done so.

The other half of the tribes have not requested that the state assume such jurisdiction, and, pursuant to RCW 37.12.010, the state has assumed a relatively limited jurisdiction. This limited jurisdiction, as it applies to Indians on tribal or allotted lands held in trust or restricted as to alienation,

covers only eight specified subject matters. These eight enumerated subject matters are similar to the subject matters with respect to which jurisdiction was assumed over the Flathead Reservation in the case at bar. Thus, the Washington reservations in this second category are similar to the Flathead Reservation, so far as the application of PL 83-280 is concerned.[6]

The Washington retail sales tax and the Washington Cigarette Tax are similar to the Montana cigarette tax, in that the legal incidence of the tax is on the retail buyer, with the seller acting as a collecting agent.[7]

[6]RCW 37.12.010 provides as follows:
The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:
(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.
Neither the subject matters involved in the Montana assumption of jurisdiction nor those involved in the assumption of jurisdiction by Washington with respect to the second category of reservations expressly cover the subject matter of taxation.

[7]In Chapter 22, Laws of 1975, 1st Ex. Sess., the Washington State Legislature amended its cigarette tax statutes in two important respects. First, it eliminated the two-carton exemption contained in RCW 82.24.260 (section 7, chapter 157, Laws of 1972, ex. sess.), which was one of the provisions which was relied upon by this Court in remanding *Tonasket v. State* back to the Washington State Supreme Court. (411 US 451). RCW 82.24.260 was further amended to provide that, with certain exceptions, the state cigarette tax is a consumer-type tax, similar to the Montana cigarette tax involved in the case at bar, when the cigarettes being sold by the retailer are unstamped.

Interest of the State of Idaho

The state of Idaho contains within its boundaries four Indian reservations and a portion of another.

The Coeur d'Alene Reservation, as originally created by Executive Order, included approximately 400,000 acres. By an act of Congress approved July 13, 1892, a small portion of the reservation was restored to the public domain and on February 7, 1894, the Indians ceded by agreement a strip one mile wide across the north side of the reservation. The remainder of the reservation was open to settlement in 1910, excluding allotted lands.[8]

Presently, Indian ownership of lands within the original exterior boundaries of the reservation include 69,299 acres, 16,236 acres of which are tribally owned and 53,063 acres of which are allotted lands. U. S. Highway 95 is the major north-south route in the state of Idaho, which also bisects the reservation and connects with Interstate 90 to the north to Spokane, Washington, a distance of approximately 50 miles from the northern boundary of the reservation. 569 Indians reside upon or adjacent to the Coeur d'Alene Reservation.[9]

[8]Hawley, Jess. 1920. *History of Idaho*. Vol. 1. Clark Pub. Co. p. 35.

[9]*Federal and State Indian Reservations and Indian Trust Areas*, n. 1, *supra*, pp. 191, 192.

The present Nez Perce Reservation, created by treaty in 1863, contains nearly 750,000 acres. Present Indian ownership encompasses 87,496.92 acres, 34,185.50 acres of which are tribally owned and 53,311.42 acres of which are allotted lands.[10]

U. S. Highway 95 traverses the reservation, and the city of Lewiston, a seaport and fourth largest city in the state of Idaho, lies no more than eight miles from the western boundary of the reservation. There are approximately 1,485 Indians living in or near the reservation.[11]

The Fort Hall Reservation includes 524,014.31 acres, 224,005.78 acres of which are tribally owned, 257,665.73 acres of which are allotted lands, and 42,343.80 acres of which are government lands. Interstate 15 and U.S. Highway 91 are north-south highway arteries running through the reservation, while U.S. Highway 30 runs east-west through the reservation. The city of Pocatello is surrounded by the reservation in three directions and is the second largest city in Idaho. The city itself is twelve miles from the nearest reservation boundary. Two thousand seven hundred forty-four Indians reside on or near the reservation.[12]

The smallest reservation in Idaho is the Kootenai Reservation with its headquarters in Bonners Ferry, Idaho. The reservation has a total area of 2,695

[10]Ibid, p. 197.
[11]Ibid, p. 199.
[12]Ibid, pp. 193, 194.

acres, 12 acres of which are government owned, with the remainder being allotted lands. U. S. Highway 95 runs north-south just west of the reservation, and Bonners Ferry, Idaho, lies ten miles from the reservation. There are 51 Indians living in or near the reservation.[13]

The Duck Valley Reservation lies partly within and partly without the state. The portion within the state covers 145,545 acres, which is in tribal trust status. The land, however, may be assigned to members of the Shoshone and Paiute tribes. The reservation is comparatively isolated, but primary state Highway 51 bisects the reservation.[14]

The proximity of the Coeur d'Alene and Nez Perce Reservations to populous areas, the extent of non-Indian ownership of lands within the original exterior boundaries of the reservations, and the presence of primary traffic arteries within these reservations indicate a potential for unfair discrimination against non-Indian sellers of cigarettes in these areas, as well as a substantial loss of revenue to the state of Idaho estimated to be approximately one-half million dollars annually, should the Court determine that these Indians are not required to collect cigarette tax upon cigarettes sold to non-Indians, even though the cigarette tax is a tax upon the consumers of cigarettes.

The danger also exists in the area of the Fort

[13]Ibid, pp. 195, 196.
[14]Ibid, pp. 303, 304.

Hall Reservation, for even though the land within the reservation boundaries is still primarily owned by Indians, the reservation is located near a major population center and traffic arteries.

None of the tribes with reservations located within Idaho have requested the state to assume full jurisdiction, and pursuant to § 67-5101, Idaho Code, and PL 83-280 the state has assumed jurisdiction of the subject matters enumerated therein.[15] Thus, the Idaho reservations are similar to the Flathead Reservation with respect to their status under PL 83-280.

The Idaho Supreme Court has determined that the Idaho cigarette tax is not a tax upon consumers, and, in that respect, the state of Idaho is not presently similarly situated to the state of Montana with respect to the taxation of cigarette sales made upon its reservations.[16] However, consideration has been

[15]§67-5101, *Idaho Code*, reads as follows:
67-5101. State jurisdiction for civil and criminal enforcement concerning certain matters arising in Indian country.—The state of Idaho, in accordance with the provisions of 67 Statutes at Large, page 589 (Public Law 280) hereby assumes and accepts jurisdiction for the civil and criminal enforcement of state laws and regulations concerning the following matters and purposes arising in Indian country located within this state, as Indian country is defined by title 18, United States Code 1151, and obligates and binds this state to the assumption thereof:
A. Compulsory school attendance
B. Juvenile delinquency and youth rehabilitation
C. Dependent, neglected and abused children
D. Insanities and mental illness
E. Public assistance
F. Domestic relations
G. Operation and management of motor vehicles upon highways and roads maintained by the county or state, or political subdivisions thereof.

[16]*Mahoney v. State Tax Commission*, ... Idaho ....., 524 P.2d 187 (1973), *cert. den.* ..... US ..... (Dec. 23, 1974).

given to amending the cigarette tax in this respect. Further, the Idaho general retail sales tax is a vendee or consumer tax. See § 63-3619, Idaho Code.

II.

ARGUMENT IN SUPPORT OF JURISDICTIONAL STATEMENTS

A. The appeal of the Confederated Salish and Kootenai Tribes, No. 75-50.

If the Flathead Reservation in Montana, and the various reservations in Washington and Idaho were all remote and isolated areas, and if, as a result, the Indians residing thereon were geographically and economically isolated from the non-Indian population, the litigation in which these three states have become embroiled would probably have never arisen in the first instance. For absent this physical proximity to and integration with the non-Indian population, the problem of tax free sales of cigarettes or other merchandise by Indian retailers to non-Indian consumers would be minimal, if existent at all. It is not overly fanciful to suggest that the problem confronting Montana, Idaho, and Washington arises essentially from two combined sources: the invention of the automobile, and the federal government's past policy of opening up most Indian reservations to settlement by non-Indians.[17]

[17]This economic and physical integration in the Pacific Northwest presents a striking contrast with the situation on the Navaho reser-

In an attempt to exploit the economic advantage of their proximity to the non-Indian population, numerous Indians in Montana, Washington, and Idaho have set up "smoke shops" whose principal trade is with the non-Indian population.[18] The basic issue before the court on the appeal of the Indian retailers in the case at bar is this: do these Indians have a legal right to make sales to the non-Indian population free from any obligation to collect the tax which has been imposed upon their customers and which is required to be collected from those customers by the seller?

As recognized by the court below, this precise issue has not been passed upon by this Court. (May 10 opinion, page 19)

The legal uniqueness, as well as the practical importance, of this issue is perhaps best seen by comparing it with the issues involved in the trilogy of Indian tax cases decided in 1973, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, and *Tonasket v. Washington*, 411 U.S. 451.

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vation involved in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, (1973). The relative isolation of the Navahos undoubtedly accounts for the fact that Arizona has not been experiencing any problem of substantial tax-free Indian sales to non-Indians, and accordingly no litigation similar to the case at bar has arisen between the Navahos and Arizona.

[18]This Indian tax problem has arisen primarily in the context of cigarette taxes, and for a very good reason. These taxes are typically high, the Montana tax being 12 cents a pack, the Washington tax being 16 cents a pack, and the Idaho tax being 9.1 cents a pack. To be able to sell tax free cigarettes obviously gives an overwhelming competitive advantage to the seller.

Like the Mescalero Apache Tribe, the Indian smoke shop owners in the case at bar have become entrepreneurs, dealing principally with the general non-Indian population. However, unlike the tribe in *Mescalero*, the Indian cigarette sellers do not have to move off their reservation in order to set up their new businesses. It is a simple matter for the non-Indian population to come to them; all it often takes is a short turn off the highway.

Thus, this case at bar has a similarity with *McClanahan*, in that the state law being challenged has its operative effect on the reservation. However, even apart from factual differences between the reservations involved, this case differs from *McClanahan* in two fundamental aspects. The challenged operative effect of the Montana law occurs solely with respect to a commercial transaction between the Indian and a non-Indian. Secondly, in such a transaction, the legal incidence of the tax is not upon the Indian seller, but rather upon the non-Indian buyer, with the Indian seller having solely a collection obligation. In contrast, the tax involved in *McClanahan* was an income tax, the legal incidence of which was solely upon the earnings of an Indian derived entirely from reservation sources, and having nothing to do with transactions with non-Indians.

Factually, the case at bar is closest to *Tonasket*, in which this court remanded the case for further consideration by the Washington State Supreme

Court. Like the case at bar, *Tonasket* involved the application of a cigarette tax to sales by an Indian retailer to non-Indian consumers. However, the case at bar has differences even from the *Tonasket* case. In *Tonasket*, the state had assumed maximum permissible jurisdiction under Public Law 83-280 over the Colville Reservation, whereas in the case at bar Montana has assumed only limited jurisdiction. Secondly, under the Washington cigarette taxes then in effect, the incidence of the tax was upon the seller rather than the consumer.[19]

This Court stated in *McClanahan*:

> "This case requires us once more again to reconcile the plenary power of the states over residents within their borders with the semi-autonomous status of Indians living on tribal reservations." 411 U.S. 164 at 165.

The case at bar requires another such reconciliation. However, the need for such reconciliation is even more urgent than in *McClanahan*. For what is at stake here is the alleged right of Indians to set up, in competition with non-Indian retailers, tax havens

[19]The degree of similarity between the case at bar and the *Tonasket* depends, of course, on how the question of the scope of Public Law 83-280 is resolved. On remand from this court, the Washington State Supreme Court reaffirmed its prior decision that Public Law 83-280 did include taxing jurisdiction, with the specific exceptions enumerated in Public Law 83-280 itself. See 84 Wn.2d 164 (1974). Dismissed for want of a substantial federal question, 420 US 915 (1975). In his brief *amicus curiae* urging reversal, the Solicitor General took the position that the Washington State Supreme Court was incorrect, i.e., that Public Law 83-280 did not include taxing jurisdiction within its reach. However, in this same brief, the Solicitor General expressly declined to take a position on the question of whether Indian retailers could make tax-free sales to non-Indians. If the Solicitor General be correct, and the Washington State Supreme Court incorrect, as to the scope of Public Law 83-280, the issue presented in *Tonasket* and the issue presented in the case at bar are even more similar than we have suggested above.

for the general non-Indian population which are not only destructive of state revenues, but of the business of non-Indian competitors.

From its very inception, this Court has been the guardian of the basic policy embodied in the interstate commerce clause of the constitution, i.e., the policy of affording free and equal competition in a national market, unfettered by state tax policies which are destructive of this competition. It would be ironical indeed were this Court to consider unimportant the question of whether Indians may move in exactly the opposite direction, i.e., may operate in the geographical pockets in which they may cut off any effective competition.[20]

B. The Appeal of the State of Montana, No. 74-1656.

The issue of the taxability of cigarette sales by an Indian retailer to an Indian consumer does not present as great a problem, revenue-wise, as does the issue of sales to non-Indian consumers. However, the issue does require a reconciliation between the unique legal status of Indians and the demands of the Due Process Clause of the Fifth Amendment. Although this Court dealt with a similar issue in *Morton v. Mancari*, 417 U.S. 535 (1974), the issue raised on this appeal involves fundamental

[20]Although, as previously noted in n. 4, the problem facing Montana, Washington and Idaho has developed in the context of cigarette taxes, the concern of the states is much broader than this. If cigarettes can be sold to non-Indians free from the cigarette tax, there is absolutely no reason why general merchandise cannot be similarly sold, free from a general retail sales tax.

questions which remain unanswered, even after *Morton*. Hence the importance of this issue.

Certain preliminary considerations may assist in putting this issue in focus.

First, in approaching any question involving the applicability of state substantive law to Indians on an Indian reservation, it is misleading to view the question in terms of the complete presence or the complete absence of such state substantive jurisdiction. All Indians are citizens of the United States and of the state in which they reside.[21] Accordingly, they are entitled to all of the benefits of the Equal Protection Clause of the Fourteenth Amendment. For example, if a state were to attempt to deprive reservation Indians of the right to vote, of the right to receive welfare payments or unemployment compensation, of the right to attend public schools, or of any other state service, this would be a violation of the Fourteenth Amendment. Thus, state substantive jurisdiction, insofar as it involves what might be termed the "benefit side" of state law, automatically extends to Indians and Indian reservations, by reason of the Fourteenth Amendment. What is in issue, then, is solely the applicability of what might be termed the "burden side" of state law, of which tax laws are but one example.

Secondly, the Congress has a unique obligation toward and a unique historical relationship with the

[21]See 8 USC 1401 (a) (2).

Indians, as a result of which the Congress may, in a manner consistent with the equal protection principles embodied in the due process clause of the Fifth Amendment, single out for special treatment a constituency of tribal Indians living on or near reservations. This special treatment, under certain circumstances, may include relief from the "burden side" of state laws, e.g., through congressionally mandated exemptions from state and local taxes, such as exemption of Indian land from property taxation. *Morton v. Mancari, supra*; *Board of County Commissioners v. Seber*, 318 U.S. 705 (1943).

Thirdly, and even more generally, the Congress has a very broad power to create immunities from state and local taxation for those entities, even though they be essentially private in nature, which it chooses to carry out valid federal programs. Thus the Congress may provide tax immunities for a private contractor performing functions for the Atomic Energy Commission [*Carson v. Roane-Anderson Company*, 342 U.S. 232 (1952)], and it may provide tax immunities for a federally chartered bank. *Agricultural National Bank v. Tax Commission*, 392 U.S. 339 (1968). Similarly, the Congress may exempt military personnel from certain state and local taxes. *Dameron v. Brodhead*, 345 U.S. 322 (1953).

However, could the Congress, consistently with the Fifth Amendment, establish a program for improving the economic status of a minority group,

such as Mexican-Americans, and thereby provide special immunities from state and local taxation for, e.g., Mexican-American servicemen, national banks owned by Mexican-Americans, or Mexican-American contractors doing business with the federal government? Quite clearly it could not. For this preferential tax immunity for the Mexican-Americans would bear no rationale relationship to Congress's undisputed power to provide for the common defense, establish a system of national banks, or provide for procurement of goods and services for federal agencies.

Should a different result obtain for reservation Indians? To state the issue more precisely, to what extent does the admitted power of Congress to provide for Indian welfare allow the Congress to provide preferential tax immunities for these Indians?

The key to answering this question is, we believe, provided in Footnote 12 of Judge Smith's dissent in the Supplemental Order and Opinion of February 4, 1975, in which he discusses *Morton v. Mancari* as follows:

> "I do not regard Morton v. Mancari, 417 U.S. 535 (1974), as contrary. That case involved the Indian in relationship to the federal government and not the Indian in relationship to the state. Even with respect to the federal government the opinion is carefully limited to the problem of preferential employment in the Bureau of Indian Affairs, which was related to 'Indian self-government.' Perhaps it can be said that granting Indians an exemption from cigarette

> taxation 'is reasonable and rationally designed to further Indian self-government,' but I don't think so.
>
> Where unequal rights are enjoyed by the Indian because [of] 'the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes,' (at 551) then it would seem that the inequality could be justified only in terms of that relationship. If the guardian requires that the ward be the beneficiary of the state's services and the ward accepts those services, then the new relationship of the ward is out of the orbit of federal management and the inequality should not persist as to the new relationship."

Judge Smith is suggesting that the Congress cannot "play it both ways". By making all Indians citizens, the Congress has extended to them the benefits of the Equal Protection Clause of the Fourteenth Amendment and has thereby required that the "benefit side" of state law must be afforded to Indians. To this extent, the guardian-ward status of Indians has been removed, and that status or special relationship with the federal government can no longer be used as justification for preferential tax immunities.

We are not suggesting, however, nor is Judge Smith suggesting, that the Fifth Amendment invalidates any and all special tax immunities for Indians. For example, it is still a function of the federal government to preserve intact the land holdings of

Indians. Accordingly, there can be no doubt as to Congress's power to exempt from taxation property owned by an Indian or an Indian tribe when it is held in trust or subject to a restriction against alienation. See *Board of County Commissioners v. Seber*, *supra*. But, in this instance the ward status of the Indians persists, and it is the continuation of this status which justifies the exemption.

Similarly, in establishing a federally funded economic assistance program for Indians, the Congress may provide tax immunities in furtherance of that program. See 25 USC 465, and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

In the case at bar, however, the claim of tax immunity upheld by the majority of the district court was in no way related to any type of program undertaken by the federal government as guardian of the Indian wards. The claim was made—and upheld—solely because of the status of the claimants as reservation Indians.

Thus, the case at bar squarely presents the question of whether immunity from the "burden side" of state law is compatible with the Due Process Clause of the Fifth Amendment when the basis of the claimed immunity is simply and solely the status of the claimants as Indians.[22] This question is, we suggest, one of the major unresolved questions in the

[22]Note that the majority opinion expressly extended the immunity to any Indian residing on the reservation, whether he be a member of the Confederated Tribes or not.

entire field of Indian-State relations, and merits full consideration by this Court.[23]

CONCLUSION

For the reasons given above, probable jurisdiction should be noted for both appeals.

Respectfully submitted,

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APPENDIX A

PROXIMITY OF INDIAN RESERVATIONS TO MAJOR POPULATION CENTERS IN WASHINGTON STATE

APPENDIX B

MAJOR PENDING INDIAN TAX LITIGATION STATE OF WASHINGTON

King v. Kinnear, USDC WD No. 4243 (Puyallup)

[23]*McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) is not determinative of this issue, for the reason that it did not address itself to this issue. However, if *McClanahan* be read as deciding this issue with respect to Indians residing on a remote and isolated reservation such as that of the Navajos, a further question remains. Are the Indians on the Flathead reservation, as a factual matter, more akin to the Navajos on the one hand or to the Oklahoma Indians on the other. See *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). As recognized in *McClanahan*, these factual differences lead to different legal results. 411 U.S. at 167, 168.

Frank, Mills and Adams, et al. v. Kinnear, USDC WD No. 62-71C3 (Nisqually)

George v. Kinnear, USDC WD No. 266-73C2 (Port Madison)

Confederated Tribes of the Colville, et al. v. State, USDC ED No. 3868 (Colville, Lummi, Makah)

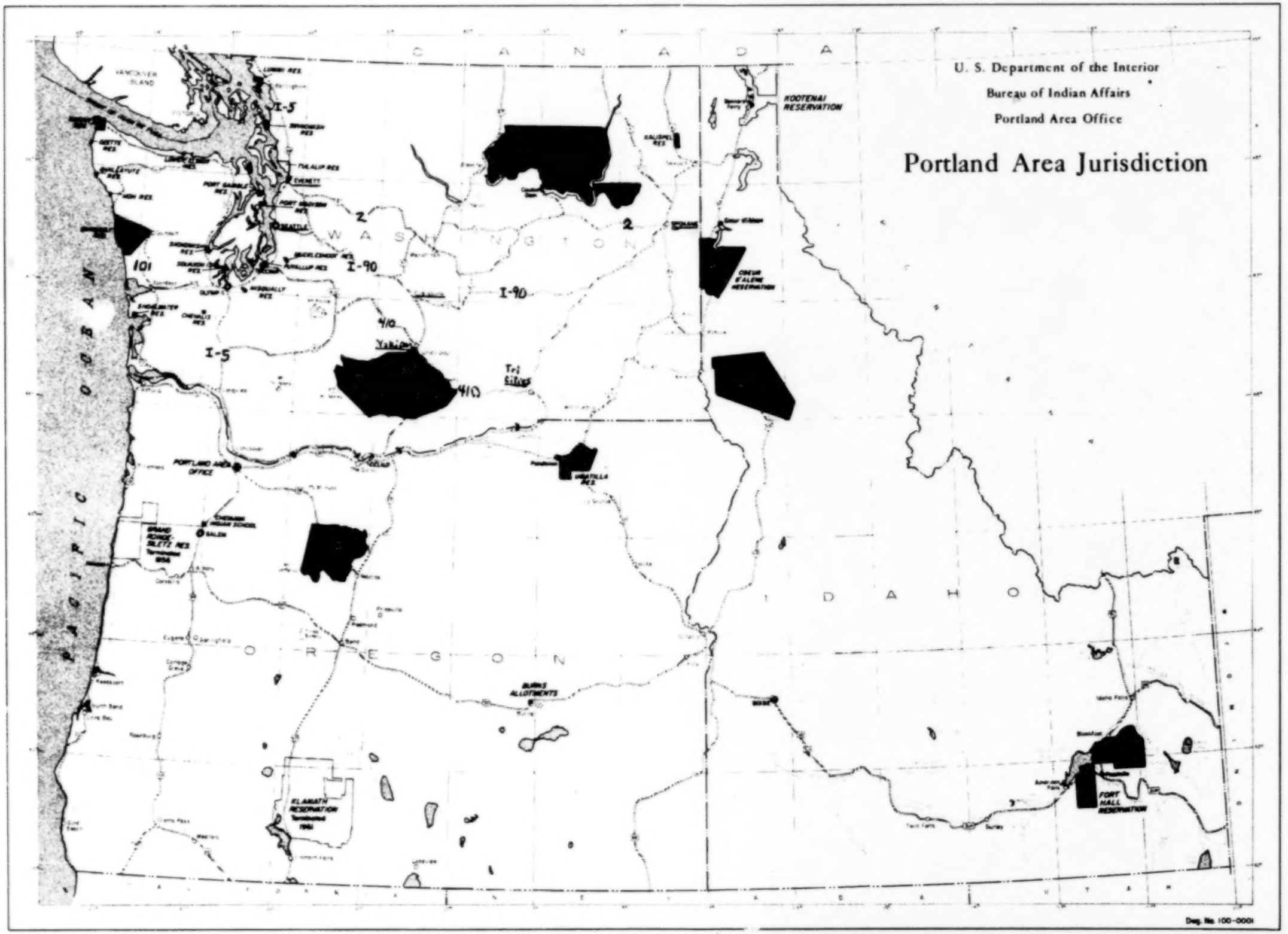
Satiacum v. McCaffree, USDC WD No. C74-111T (Puyallup)

U.S.A. v. State, USDC ED No. 3909 (Yakima)

The Quileute Indian Tribe, et al. v. State, USDC WD C74-761S (Quileute, Muckleshoot, Nisqually, Chehalis, Skokomish, Squaxin Island, Quinault, Shoalwater Bay)

APPENDIX A

PROXIMITY OF INDIAN RESERVATIONS TO MAJOR POPULATION CENTERS IN WASHINGTON STATE



NO FORMAL PRINTED APPENDIX
WAS FILED IN THIS CASE, A
MOTION HAVING BEEN MADE AND
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RECORD

Supreme Court, U. S.
FILED
JUL 9 1975
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IN THE

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OCTOBER TERM, 1974

No. 74-1656

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THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al., *Appellees.*

On Appeal from the United States District Court for the District of Montana

APPELLEES' MOTION TO AFFIRM

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APPELLEES' MOTION TO AFFIRM

Appellees move the Court to affirm the judgments sought to be reviewed on the main appeal on the ground it is manifest the questions involved are so insubstantial as not to need further argument.

I.

Appellants seek full review of decisions of a three-judge panel [1] of the United States District Court for

---

[1] Convened pursuant to 28 U.S.C. § 2284 to determine a challenge to the constitutionality of state statutes as applied to plaintiffs.

the District of Montana, Missoula Division, in two cases involving the jurisdiction of the State of Montana to tax members of the Confederated Salish and Kootenai Tribes residing within the Flathead Indian Reservation. As is completely set forth in the Jurisdictional Statement filed simultaneously with this Motion by appellees (as cross-appellants), the lower court in ***Moe, et al.*** v. ***Confederated Salish and Kootenai Tribes, et al.*** (the cigarette tax case), held that the state could not require tribal members to possess cigarette vendor licenses in order to sell cigarettes on the Reservation and could not tax sales to Indians residing therein. This portion of the decision is involved in the main appeal.[2]

The lower court also held in ***State of Montana, et al.*** v. ***Confederated Salish and Kootenai Tribes, et al.*** (the personal property tax case), that, on the authority of ***Moe,*** the state could not tax the personal property of tribal members residing within the Reservation. This entire decision is involved in the main appeal. The three main opinions in the cigarette tax case appear in the Appendix to Appellants' Jurisdictional Statement (App., pp. 11-35, 37-71, 73-86), and the single opinion in the personal property tax case is at App., pp. 3-10.

II.

The questions on the main appeal lack substantiality for review because the lower court, in deciding them, simply followed the consistent decisions of this Court.

[2] The lower court also held in *Moe* that the state could require tribal members to precollect for the state the tax on cigarette sales within the Reservation by members to non-Indians. This portion of the decision is involved in the cross-appeal.

No other result is permissible unless a series of landmark Indian cases is to be suddenly overturned.

The lower court was faced with the fact that the United States, by the Treaty of Hell Gate, July 16, 1855, 12 Stat. 975 (App., pp. 117-24), reserved for the "exclusive use and benefit" of the Salish and Kootenai Tribes a tract of land, now known as the Flathead Indian Reservation, within the State of Montana. Article II of the Treaty prohibited residence by any white men within the Reservation except those employed by the Indian Service or those obtaining the permission of the Tribes and the Reservation superintendent. This exclusiveness of the Flathead Reservation was preserved and underscored by Congress in the Montana Territorial Act of May 26, 1864, 13 Stat. 85, 86, and in section 4 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677, which required the state to disclaim all right, title and interest to the Indian lands within its borders. The state did so by section 2 of Ordinance I, Montana Constitution. The Reservation was opened to non-Indian entry by the Act of April 23, 1904, 33 Stat. 302, as amended. In 1935, the Tribes organized pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461, *et seq.*

In light of this the district court could not avoid following *McClanahan* v. *Arizona State Tax Comm'n.*, 411 U.S. 164 (1973), which held that, absent clear Congressional expression to the contrary, the State of Arizona cannot tax Navajo Indians residing on their Reservation. There are no significant legal facts distinguishing the Navajo Reservation from the Flathead Reservation, and appellants have advanced absolutely no distinction between the income tax involved

in *McClanahan* and the taxes involved in the instant cases that would merit different outcomes.

CONCLUSION

Jurisdiction should be noted and the decisions on the main appeal affirmed.

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On Appeal from the United States District Court For the District of Montana

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INDEX

Page

Table of Authorities iii

Opinions Below 2

Jurisdiction 2

Constitutional Provisions, Treaty and Statutes Involved 3

Questions Presented 3

Statement of the Case 4

Summary of Argument 7

Argument

1. The immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States. 8

2. The immunity from state taxation granted to Indians on the Flathead Reservation is contrary to the provisions of the General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349, and related legislation. 14

3. The district Court erred in holding it had jurisdiction to enjoin enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C. § 1341. 19

4. The State of Montana has jurisdiction over individual Indian citizens who are members of the Confederated Salish and Kootenai Tribes residing on the Flathead Reservation to require precollection of state cigarette taxes on sales of cigarettes to non-Indians. 23

Conclusion 25

Certificate of Mailing 26

TABLE OF AUTHORITIES

CASES: **Page**

Agua Caliente Band of Mission Ind. v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971) cert. denied 405 U.S. 933 (1972) 20

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959) 11

American Commuters Association, Inc. v. Levitt, 405 F.2d 1148 (2nd Cir. 1969) 21

Barrows v. Jackson, 346 U.S. 249 (1952) 12

Bland v. McHann, 463 F.2d 21 (5th Cir. 1972) 21, 22

Boling v. Sharpe, 347 U.S. 497 (1954) 10, 11

Boyd v. Nebraska, 143 U.S. 135 (1892) 10

Brown v. Board of Education, 349 U.S. 294 (1954) 13

Bulluck v. Washington, 468 F.2d 1096 (D.C. Cir. 1972) 11

Bussie v. Long, 383 F.2d 766 (5th Cir. 1967) 19

Choctau Nation v. United States, 318 U.S. 423 (1943) 17

Confederated Tribes v. Namen, 380 F.Supp. 349 (D. Mont. 1974) 14, 16

DeFunias v. Odegaard, 416 U.S. 312 (1974) 12, 13

Department of Employment v. United States, 385 U.S. 355 (1966) 19

Dickson v. Luck Land Co., 242 U.S. 371 (1917) 14

Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17 (1934) 21

Frontiero v. Richardson, 411 U.S. 677 (1973) 10, 11

Gloss v. Board of Education, 373 U.S. 683 (1963) 13

Goudy v. Meath, 203 U.S. 146 (1906) 15, 16

Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971) cert. den. 405 U.S. 999 (1972) 9, 10
Loving v. Virginia, 388 U.S. 1 (1967) 9, 10, 11, 13
Martin v. Mancari, 417 U.S. 535 (1974) 13
Mattz v. Arnett, 412 U.S. 481 (1973) 16
McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) 12, 13, 20, 24
Mescalaro Apache Tribe v. Jones, 411 U.S. 145 (1973) 13, 17, 20, 21
Non-Resident Taxpayer Ass'n v. Municipality of Philadelphia, 478 F.2d 456 (3rd Cir. 1973) 19
Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943) 12, 17
Seymour v. Superintendent, 368 U.S. 351 (1962) 16
Shelley v. Kraemer, 334 U.S. 1 (1948) 12
Stevens v. C.I.R., 452 F.2d 741 (9th Cir. 1971) 16
The Confederated Salish and Kootenai Tribes v. Moe, 392 F.Supp. 1297 (D. Mont. 1975) 2, 11, 13, 20
The Confederated Salish and Kootenai Tribes v. State of Montana, 392 F.Supp. 1325 (D. Mont. 1975) 2
United States v. Arlington County, Commonwealth of Virginia, 326 F.2d 929 (4th Cir. 1964) 19
United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938) 10
United States v. Rogers, 45 U.S. (4 How.) 567 (1846) 9
Walters v. City of St. Louis, 347 U.S. 231 (1954) 11
Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) 12, 23
Williams v. Lee, 358 U.S. 217 (1959) 24
Worchester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 13

CONSTITUTIONAL PROVISIONS: **Page**

Article I, Sec. 8, Clause 3, United States Constitution 3, 10
Fifth Amendment, United States Constitution ... 3, 7, 8, 11
Fourteenth Amendment, United States Constitution 3, 8, 9, 10, 11
Fifteenth Amendment, United States Constitution 3, 10

TREATY: **Page**

Treaty of Hell Gate, 12 Stat. 975 ..... 3, 4, 9

UNITED STATES STATUTES: **Page**

Act of April 23, 1904, 33 Stat. 302 ..... 4, 14
Act of June 2, 1924, 43 Stat. 253 ..... 3, 10
Civil Rights Act of 1870, 42 U.S.C. 1981 6
General Allotment Act, 25 U.S.C. § 349, 24 Stat. 390 ..... 3, 7, 8, 14, 15, 16, 17
Indian Reorganization Act of 1934, 48 Stat. 984 ..... 15, 16
25 U.S.C. 181 9
25 U.S.C. 182 9
25 U.S.C. 184 9
28 U.S.C. 1253 2
28 U.S.C. 1341 ..... 3, 4, 8, 19, 21, 23
28 U.S.C. 1343 ..... 8, 19, 21, 22
42 U.S.C. 1981 16
42 U.S.C. 1983 ..... 19, 21, 22

MONTANA STATUTES: **Page**

R.C.M. 1947, Sec. 53-114 ..... 3, 7
R.C.M. 1947, Sec. 53-119 7
R.C.M. 1947, Sec. 53-1025 to -1029 3
R.C.M. 1947, Sec. 84-201 3

R.C.M. 1947, Sec. 84-301 3
R.C.M. 1947, Sec. 84-404 3
R.C.M. 1947, Sec. 84-406 3
R.C.M. 1947, Sec. 84-409 and -410 3
R.C.M. 1947, Sec. 84-601 to -607 19
R.C.M. 1947, Sec. 84-708, -709 and -709.1 19
R.C.M. 1947, Sec. 84-4201 and -4202 3
R.C.M. 1947, Sec. 84-4502 19
R.C.M. 1947, Sec. 84-4505 19
R.C.M. 1947, Sec. 84-5606 to -5606.31 ..... 3, 23, 24

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---

OPINIONS BELOW

The opinions of the District Court are reported in part. Three opinions were issued in the cigarette tax case (Civil No. 2145) on October 10, 1973, May 10, 1974 and February 4, 1975 respectively. The opinions of May 10, 1974 and February 4, 1975 are reported in *The Confederated Salish and Kootenai Tribes v. Moe,* 392 F.Supp. 1297 (D. Mont. 1975). All three opinions are set forth in the Appendix to Appellants' Jurisdictional Statement[1] (App. pp. 73-86, 37-71 and 11-35)[2]. The final order and opinion in the companion property tax case (Civil No. 74-40-M) issued on March 19, 1975 is reported in *The Confederated Salish and Kootenai Tribes v. State of Montana,* 392 F.Supp. 1325 (D. Mont. 1975), and is set forth in the Appendix to Appellants' Jurisdictional Statement (App. pp. 3-10). A separate memorandum of March 19, 1975 in the property tax case is reproduced in the Appendix to Appellees' Jurisdictional Statement on Cross Appeal (App. pp. 1A-2A).

JURISDICTION

Final judgments of the three-judge district court, by divided vote, were entered March 19, 1975. Notices of appeal were filed on May 6, 1975 in No. 74-1656 and on May 16, 1975 in No. 75-50. On October 6, 1975, this Court noted probable jurisdiction and consolidated the appeal in No. 74-1656 with the cross appeal in No. 75-50. The jurisdiction of this Court rests upon 28 U.S.C. § 1253.

[1]References to the Appendix to Appellants' Jurisdictional Statement are abbreviated herein as "App.".

[2]Leave to dispense with an Appendix to the briefs under Rule 36 was granted by Order of the Court dated November 3, 1975.

CONSTITUTIONAL PROVISIONS, TREATY AND STATUTES INVOLVED

The constitutional provisions, treaty and statutes involved in this case are: Fifth Amendment to the Constitution of the United States; Fourteenth Amendment to the Constitution of the United States; Fifteenth Amendment to the Constitution of the United States; Article I, Sec. 8, Clause 3 of the Constitution of the United States; Treaty of Hell Gate, 12 Stat. 975; The General Allotment Act, 25 U.S.C. § 349, 24 Stat. 390; Act of June 2, 1924, 43 Stat. 253; 28 U.S.C. § 1341; R.C.M. 1947, §§ 53-114, 53-1025 to -1029, 84-201, 84-301, 84-404, 84-406, 84-409 and -410; 84-4201 and -4202; and 84-5606 to -5606.31. The texts of these constitutional provisions, treaty and statutes are reprinted in the Appendix to Appellants' Jurisdictional Statement (App. pp. 115 ff).

QUESTIONS PRESENTED

The questions presented by the consolidated appeals are:[3]

1. Whether the immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States.

2. Whether the immunity from state taxation granted to Indians on the Flathead Reservation is contrary to the provisions of the General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349, and related legislation.

[3]Issues 1, 2 and 3 are presented by the appeal of the State of Montana in No. 74-1656. Issue 4 is raised in the cross appeal of the Confederated Tribes in No. 75-50.

3. Whether the District Court erred in holding it had jurisdiction to enjoin enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C. § 1341.

4. Whether the State of Montana had jurisdiction over members of the Confederated Salish and Kootenai Tribes residing on the Flathead Reservation to force them to precollect state cigarette taxes on sales to non-Indians.

STATEMENT OF THE CASE

The Flathead Reservation, created by the Treaty of Hell Gate in 1855 (12 Stat. 975) consists of approximately 1,245,000 acres located in northwestern Montana. (App. pp. 12-13) In 1904 Congress provided for allotments in severalty to members of the Tribes "under the provisions of the allotment laws of the United States." Act of April 23, 1904, 33 Stat. 302. Surplus unallotted lands within the Reservation were surveyed and appraised and opened for settlement under the homestead laws. As a result, over 404,000 acres were sold to non-Indians. A portion of the lands allotted to individual Indians passed into non-Indian ownerships (App. p. 23) while some Indian patentees still reside on the Reservation. (App. p. 19) The State of Montana received over 60,000 acres for school purposes. Additional acreages were passed to churches and schools and others. At present approximately 628,642 acres are owned in fee and 614,311 acres are held in trust either for the Tribes or for individual Indians. (App. p. 13) The Reservation lies in parts of four Montana counties — Lake, Sanders, Missoula and Flathead. (App. p. 13)

As a result of congressional action, the Flathead Irrigation Project was created on the Reservation. Irrigation districts were established under state law and through use of the state courts of the State of Montana to operate and maintain the project and to repay the United States for construction costs of the project. An elaborate irrigation

system has been built and extensive domestic power projects established to provide power for pumping and domestic and commercial use on Indian and non-Indian lands on the Reservation. (App. p. 23)

The Reservation is a well developed agricultural area with farms, ranches and communities located throughout the inhabited portions of the Reservation. Indians and non-Indians are randomly scattered over the whole of the occupied portions of the Reservation and live together in integrated communities. Banks, businesses and professions on the Reservation provide services to Indians and non-Indians alike. (App. p. 13)

Only about 19 per cent of the total Reservation population of approximately 17,826 is Indian. Enrolled members in the Tribes number approximately 5,749. Less than 3,000 members reside on the Reservation. Over 2,000 live outside the State of Montana. Over 4,000 of the tribal members have less than one-half Indian blood. Only 166 individuals are classified as full blood Indians. An almost equal number, 159, are less than one-sixteenth Indian blood. (App. p. 13) In many families residing on the Reservation only one of the parents is a member of the Tribes and only a part of the children are tribal members or are eligible for tribal membership. (Plaintiffs' Response to Request for Admission of Facts, No. 13, September 13, 1974)

As Montana citizens members of the Tribes are eligible to vote and do vote in city, county and state elections. Some hold elective and appointive offices. All services provided by the state and local governments are equally available to Indians and non-Indians, including welfare benefits from the State of Montana, aid to dependent children, social and rehabilitation services, sanitary and solid waste facilities and public water systems. (App. p. 13) Access to the courts of the State of Montana is available to tribal members. (Plaintiffs' Response to Request for Admission of Facts, No. 22, September 13, 1974)

The only schools on the Reservation are those operated by school districts of the State of Montana. (App. pp. 12-13) Indian and non-Indian children attend school at various free public schools throughout the Reservation. Approximately

27 per cent of all students in attendance at public schools are members of the Tribes. In some school districts tribal members account for a majority of the total student body. Approximately 91 per cent of the support for the schools is generated by state and local tax revenues. (Affidavit, Harold W. Hehmer, August 23, 1974)

The state and local governments have built and maintained a system of state highways, county roads and streets on the Reservation which are used by Indians and non-Indians without restriction. (App. p. 14)

The Montana cigarette tax is 12 cents on each package sold within the state. 4.5 cents of the tax is allocated by state law to the state's general fund. The general fund is used for the support of state government, including the state institutions and the state educational systems, all of which provide service to Indians and non-Indians alike. Portions of cigarette tax revenues have been used by the State of Montana to pay veterans' bonuses. Eligible tribal members have received such bonuses. The cigarette tax loss to the State of Montana resulting from the sale of cigarettes on the Flathead Reservation for the years 1972, 1973 and the first half of 1974 exceeded the sum of $591,000.00. (App. pp. 13-14)

Land held by the United States in trust for the Tribes was leased with tribal council approval by individual tribal members for the erection of "smoke shops." The council approved the purchase of cigarettes for resale by the tribal members and charged an administrative fee for the service. (App. p. 14) The individual members who established the smoke shops did not have a State of Montana licenses to sell cigarettes and the cigarettes which were sold did not have state tax stamps affixed. (App. p. 40) The Tribes and the individual Plaintiffs instituted the cigarette tax case after arrest of the operators by county officials for failure to have a cigarette dealers' license and for failure to have Montana cigarette tax stamps affixed to each package of cigarettes sold.

Personal property, including motor vehicles and mobile homes, owned by tribal members generated tax revenues to the State of Montana and its political subdivisions during the fiscal year ending June 30, 1974, of $111,159.01. Of this total sum $100,478.69 was expended by the counties, school districts, cities, towns and special taxing districts to carry out governmental purposes on the local level.

Under Montana law, motor vehicles are required to be registered before being permitted on the public streets and highways of the state. R.C.M. 1947, Sec. 53-119. An owner of the vehicle is required to pay personal property taxes on the vehicle as a condition precedent to registration of the vehicle and receipt of license plates. R.C.M. 147, Sec. 53-114(3). The personal property tax case was instituted by the Plaintiff Tribes and individual tribal members owning motor vehicles to enjoin the collection of personal property taxes.

SUMMARY OF ARGUMENT

1. Indian citizens on the Flathead Reservation are members of an integrated society participating fully in the activities of the state and enjoying all benefits of state citizenship. If the State of Montana is forced to afford to such Indian citizens a special exemption from state taxation a condition of forced invidious discrimination founded upon considerations of race will result. Such invidious discrimination, mandated by the United States, is contrary to fundamental concepts of equal protection and due process embodied in the Fifth Amendment and cannot stand.

2. The Flathead Reservation was open for settlement under the terms of the General Allotment Act. 25 U.S.C. § 349, 24 Stat. 390. The General Allotment Act specifically made Indians on the Flathead Reservation receiving patents to lands "subject to the laws***of the state [of Montana]".

Such laws included the tax laws of the state. Exemption from state taxation is not to be granted by implication. In the absence of an express exemption contrary to the plain language of the General Allotment Act neither the Confederated Tribes nor individual Indians may claim exemption from state taxation.

3. 28 U.S.C. § 1341 specifically prohibits district court jurisdiction to enjoin collection of state taxes. The district court erred in concluding the Confederated tribes were entitled to an exemption from the statutory prohibition as a "federal instrumentality", and that the individual Indian plaintiffs were entitled to assert jurisdiction of the district court under the Civil Rights Act, 28 U.S.C. § 1343. The federal instrumentality concept no longer survives as an exception to 28 U.S.C. § 1341 available to Indian tribes. The plain language prohibition against jurisdiction in § 1341 precludes jurisdiction under 28 U.S.C. § 1343.

4. The State of Montana may exert its jurisdiction within the Flathead Reservation except where state jurisdiction conflicts with federal law. No such conflict is presented here. No question of regulation of federally licensed Indian traders is raised. The voluntary commercial transaction of sales of cigarettes by individual Indians to non-Indian purchasers in no way interferes with or involves tribal self-government or any other federally protected interest.

ARGUMENT

1.

The immunity from state taxation granted to Indians on the Flathead Reservation is an unlawful and unconstitutional racial discrimination in favor of Indians and against non-Indian citizens contrary to the fundamental principles of equal protection and due process embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States.

This issue presents four square to this Court as a matter of first impression the question of how fundamental principles of due process and equal protection are interwoven into the complex fabric of the interrelationships among the state, Indian tribes within the borders of the state, tribal member Indian citizens, non-tribal member Indian citizens and non-Indian citizens. These fundamental due process and equal protection principles require reversal of the three-judge court.

The judgments of the district court create a special exemption from state taxation for certain individual citizens of the State of Montana solely because those citizens are Indians. This differentiation between Indian and non-Indian is racial in its foundations. See *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), *Loving v. Virginia*, 388 U.S. 1 (1967), *Kills Crow v. United States*, 451 F.2d 323 (8th Cir. 1971) cert. den. 405 U.S. 999 (1972) and 25 U.S.C. §§ 181, 182 and 184. In *United States v. Rogers, supra*, the racial distinction between Indian and non-Indian was discussed in the following language:

> **"Yet he [a white man adopted as a member of an Indian tribe] is not an Indian; and the exception is confined to those who by the usages and customs of the Indians are regarded as belonging to their race. It does not speak of members of a tribe, but of the race generally, — of the family of Indians; and it intended to leave them both, as regarded their own tribe, and other tribes also, to be governed by Indian usages and customs." (material in brackets added) (45 U.S. 4 How. at 573)**

The Treaty of Hell Gate does not of itself afford a basis for treatment of Indian citizens of the State of Montana differently from non-Indian citizens. At the time that treaty was negotiated in 1855 Indians were not generally considered to be citizens. Any justifiable basis for the generalization that Indians were not citizens ended with the ratification of the Fourteenth Amendment of 1868. Any remaining doubts as to United States and state citizenship of

Indians passed out of existence with enactment of the Act of June 2, 1924 (43 Stat. 253). See also *Boyd v. Nebraska*, 143 U.S. 135 (1892).

Indians are citizens of the United States and the State of Montana have and are entitled to all of the rights of citizenship including the right to vote accorded under Amendment 15 to the Constitution of the United States. In the instant case the facts demonstrate an unfettered exercise of all rights of citizenship by tribal members on the Flathead Reservation as members of an amalgamated and integrated society. They do not live in isolation on the Reservation apart from white or other ethnic groups. They can and do come and go freely from the Reservation to other parts of the State of Montana using, in part at least, motor vehicles which by the judgment below are exempt from state taxation.

The power of Congress under Art. I, Sec. 8, Cl. 3 of the United States Constitution to regulate commerce within Indian tribes is not without limitation and affords no justifiable basis for perpetuation of distinctions between citizens of the state which are in reality ethnic and racial in character. Inquiry into the reaches of congressional power to deal with Indian tribes discloses "that power is subject to constitutional limitations." *United States v. Klamath and Moadoc Tribes*, 304 U.S. 119, 123 (1938). Constitutional principles apply to all congressional action involving Indian tribes and to all phases of the United States dealings with Indians. Cf. *Kills Crow v. United States, supra.*

This Court has long adhered to the view that classifications based on race are contrary to our traditions and are constitutionally suspect. *Bolling v. Sharpe*, 347 U.S. 497 (1954), *Loving v. Virginia, supra*, and cases there cited at 388 U.S. 11 and *Frontiero v. Richardson*, 411 U.S. 677 (1973). Such classifications when created by the United States, as distinct from those created by the states, are no less suspect. *Bolling v. Sharpe, supra.*

While the Fourteenth Amendment does not per se apply to the federal government, its concept of equal protection

applies to the United States through the due process clause of the Fifth Amendment. *Bolling v. Sharpe, supra*, and *Bulluck v. Washington*, 468 F.2d 1096 (D.C. Cir. 1972). The requirement of equal protection has been applied frequently in tax classification cases. *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959) and *Walters v. City of St. Louis*, 347 U.S. 231 (1954).

The State of Montana obviously could not, consistent with Fourteenth Amendment concepts of equal protection, enact legislation which would discriminate as a class against Blacks or Mexican Americans. *Loving v. Virginia, supra.* Nor could Congress enact legislation directing the State of Montana to exempt all Blacks or Mexican Americans from state taxation without violating the equal protection concept embraced in the Fifth Amendment. *Bolling v. Sharpe, supra*, and *Frontiero v. Richardson, supra.*

If the State of Montana cannot, within the framework of equal protection, assume to tax on the basis of a distinction that is arbitrary and capricious it cannot be forced by the United States, in the exercise of its plenary but constitutionally limited power over Indian tribes to create a tax class solely based upon the arbitrary classification of some persons as Indians. Yet that is exactly what the decision of the district court has obliged the State of Montana to do. It must participate in a program of invidious discrimination by treating its non-Indian citizens differently from its Indian citizens. Judge Smith's dissent in *Moe* aptly summarizes the position in which the State of Montana is placed:

> "If, as I view it, the Flathead Indian is entitled to a full measure of Montana state and local government services, then I think the federal government may not, without invading the constitutional rights of non-Indian taxpayers, exempt Indians from the burdens of state taxation except to the extent that the people of the state accepted the congressional exemption stated in the Enabling Act. Stated differently, Congress has the

power to require that Indians be not deprived of the equal protection of state laws, and it has the power to exempt the Indian from state taxation, but in my opinion the exercise of both of these powers at the same time would deprive non-Indians of equal protection." (392 F.Supp. at 1321; App. pp. 28-29)

As noted in *Oklahoma Tax Comm'n v. United States,* 319 U.S. 598, 610 (1943) equality of privilege and equality of obligation are "inseparable associates". That balance of equality is destroyed by the decision of district court. It can only be restored by abolition of the exemption from state taxation for Indian citizens.

The invidious discrimination problem was presented, but not decided, in a different factual context in *DeFunias v. Odegaard,* 416 U.S. 312 (1974). The issue here, however, is not moot and will not pass with time. It can only intensify unless resolved by this Court.

No individual citizen or group of citizens has the right under the Constitution to demand action by the state which results in the denial of equal protection of the law to other citizens. *Shelley v. Kraemer, 344 U.S. 1 (1948)* and *Barrows v. Jackson,* 346 U.S. 249 (1952). Yet that is the result when the State of Montana is obliged to provide all state services to its Indian citizens and to extend to its Indian citizens all benefits of citizenship while imposing upon its non-Indian citizens the additional burden of taxation to supply services to Indians. Equality of privilege and of obligation are not maintained.

The pronouncements of this Court in *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164 (1973) are not in conflict with the position of the State of Montana asserted here. In *McClanahan* the Court dealt with the narrow question of "whether the State may tax a reservation Indian for income earned exclusively on the reservation". (411 U.S. at 168) In so doing the unique status of the Navahos who lived apart on a reservation over which the state generally lacked jurisdiction and to whom state services generally were not extended was recognized. *Warren Trading Post Co.*

v. Arizona Tax Comm'n, 380 U.S. 685 (1965). The whole of the history of the Flathead Reservation as well as the present status of Indians living on the Flathead Reservation is different. See Judge Smith's discussion of this point at 392 F.Supp. 1323-24, App. 32-34. No analogy between *McClanahan* and the cases at bar can be drawn.

The exemption recognized *Mescalaro Apache Tribe v. Jones,* 411 U.S. 145 (1973) extended only to the Tribe for property intimately connected with tax exempt real property. No such parallel exists between *Jones* and this appeal which is concerned with exemptions to individual Indian citizens.

The issue before the Court in *Martin v. Mancari,* 417 U.S. 535 (1974) likewise does not dictate a result contrary to the state's position here. That case involved solely the Indian in relationship to the federal government not in relationship to the state. The opinion is carefully limited to a problem of preferential employment in the Bureau of Indian Affairs — a problem related to Indian self-government.

Even if it be accepted that the historical treatment of Indians differently from non-Indians has a bearing on this appeal, we suggest that to perpetuate that distinction is to beg the real question. The rationale of treating Indians differently from non-Indians starting with *Worchester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832) arose out of another age and another time. Indians like many other minority groups, were not then citizens and were not members of society in the usual sense. That situation no longer prevails. Enlightened constitutional concepts demand a boldly different approach which obliterates racial distinctions.

Since *Brown v. Board of Education,* 349 U.S. 294 (1954) this Court has repeatedly and consistently struck down and condemned laws which were founded on racial distinctions. See e.g. *Gloss v. Board of Education,* 373 U.S. 683 (1963), *Loving v. Virginia, supra,* and *DeFunis v. Odegaard, supra,* Douglas J., Dissenting. The position taken by the district court flies directly in the face of the policy enunciated by those cases. We respectfully suggest that the policy of *Brown* and its progeny should be applied to embrace the concept that the Constitution is legally color blind.

2.

The immunity from state taxation granted to Indians on the Flathead Reservation is contrary to the provisions of the General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349, and related legislation.

The Act of April 23, 1904, 33 Stat. 302 opened the Flathead Reservation to allotment to individual Indians "under the provisions of the allotment laws of the United States" and to settlement by non-Indians under the general provisions of the homestead, mining and townsite laws of the United States. The allotment system and the General Allotment Act were specifically applied to the Flathead Reservation by the Act of April 23, 1904. *Confederated Tribes v. Namen,* 380 F.Supp. 349 (D. Mont. 1974).

Section 6 of the General Allotment Act provided in part:

> "At the expiration of the trust period, and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348 of this title, then each and *every allottee shall have the benefit of and be subject of the laws, both civil and criminal, of the state or territory in which they may reside;* and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law***" (emphasis added)

The plain meaning of this statute cannot be questioned. Only one interpretation is possible from the language of the act — upon expiration of the trust patent the Indian patentee was to become subject to the civil and criminal jurisdiction of the state.

The effect of receipt of a fee patent by an Indian patentee was discussed by this Count in *Dickson v. Luck Land Co.,* 242 U.S. 371, 375 (1917) as follows:

> "With those restrictions entirely removed and the fee simple patent issued, it would seem that the situation was one in which all questions pertaining to the disposal of land naturally would fall within the scope and operation of the laws of

> the State. And that Congress so intended is shown by the act of May 8, 1906, c. 2348, 34 Stat. 182 which provides that when an Indian allottee is given a patent in fee for his allotment he 'shall have the benefit of and be subject to all the laws both civil and criminal, of the State.' Among the laws to which the allottee became subject, and to the benefit of which he became entitled, under this enactment were those governing the transfer of real property, fixing the age of majority, and declaring the disability of minors."

In *Goudy v. Meath,* 203 U.S. 146 (1906) the Court considered a claim of exemption from state taxation by an Indian patentee who had received a fee patent under the General Allotment Act. Mr. Justice Brewer speaking for the Court answered the contention as follows:

> "But further, by the act of February 8, 1887, plaintiff became and is a citizen of the United States. The act, in addition to the grant of citizenship, provided that 'Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' Re Heff, 197 U.S. 488.
>
> Among the laws to which the plaintiff as a citizen became subject were those in respect to taxation. His property, unless exempt, became subject to taxation in the same manner as property belonging to other citizens, and the rule of exemption for him must be the same as for other citizens, — that is, no exemption exists by implication, but must be clearly manifested. No exemption is clearly shown by the legislation in respect to these Indian lands." (203 U.S. at 149)

The General Allotment Act has never been repealed although it has become inoperative since the advent of the Indian Reorganization Act of 1934, (48 Stat. 984). It nevertheless manifests an unmistakable congressional

intent that Indians receiving fee patents were, upon expiration of the trust period, to be subject to the laws of the state and otherwise considered as citizens of the state.[4]

All applicable treaties, legislative acts, general laws and executive orders applicable to the reservation must be considered in *pari materia* in determining congressional intent. *Stevens v. C.I.R.*, 452 F.2d 741, 744 (9th Cir. 1971), *Confederated Tribes v. Namen, supra,* at 380 F.Supp. 349. It is wholly unjustified to conclude that jurisdiction which was specifically conferred upon the state was withdrawn either by implication or by reference to decisions arising in wholly different factual contexts.

There is no language in the Indian Reorganization Act of 1934, 48 Stat. 984 which indicates an intent to modify the effect of the General Allotment Act as it applied to Indian fee patentees. Nor does *Mattz v. Arnett,* 412 U.S. 481 (1973) or *Seymour v. Superintendent,* 368 U.S. 351 (1962) dictate a different result. Nowhere in either of those decisions is there language from this Court which viciates the application of the General Allotment Act to Indian fee patentees.

The General Allotment Act protected the individual Indian allottee from exploitation during the period of restraint against alienation. However, once that restraint was removed he became subject to all rights and duties of citizenship. *Goudy v. Meath, supra.* If this Court holds, as did the majority of the three-judge district court, that not even those individual Indians receiving fee patents under the

[4]The language of 42 U.S.C. § 1981 is in accord. This statute provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

General Allotment Act are subject to jurisdiction of the state it must conclude that Congress did not mean what is said regarding the patentee's place as a citizen of the state. Such a result clearly would require an improper rewriting of the statute contrary to congressional intent. Cf. *Choctau Nation v. United States,* 318 U.S. 423 (1943).

On the other hand if this Court were to conclude that only those Indians receiving fee patents were subject to jurisdiction of the state and all others were not, the net effect would be to reward those individual Indians not receiving such patents at the expense of the very persons that the language of the General Allotment Act was intended to protect and benefit — fee patentee tribal members.

We suggest neither of the above results is in step with the intent of Congress or an enlightened approach to the relationship of the United States to its Indian citizens. Both should be rejected.

Exemption of Indians from taxation is not to be granted by implication. *Oklahoma Tax Comm'n v. United States, supra,* and *Mescalaro Apache Tribe v. Jones, supra.* In *Oklahoma Tax Comm'n v. United States,* this Court validated an Oklahoma tax program arising out of a factual setting not unlike that present on the Flathead Reservation. Mr. Justice Black's comments are particularly apropros to the case at bar:

> "Congress has passed laws under which Indians have become full fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more. Since Oklahoma has become a state, it has been authoritatively stated that tax losses resulting from tax immunity of Indians have totaled more than $125,000,000, a sum only slightly less than the bonded indebtedness of the state. If Congress intended to relieve these Indians from the burden of a state inheritance tax as a consequence of our

national policy toward Indians, there is still no reason why we should imply that it intended the burden to be borne so heavily by one state. But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay. 'Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. It is unreasonable that this small portion of it shall rest upon these Indians?' The Cherokee Tobacco, supra, 11 Wall. page 621, 20 L.Ed. 227. Recognizing that equality of privilege and equality of obligation should be inseparable associates, we have recently swept away many of the means of tax favoritism. Graves v. New York ex rel. O'Keefe, 306 U.S. 466, permitted States to impose income taxes upon government employees and Helvering v. Gerhardt, 304 U.S. 405, permitted the federal government to impose taxes on State employees. O'Malley v. Woodrough, 307 U.S. 277, overruled a previous decision which held that judges should not pay taxes just as other citizens, and Helvering v. Mountain Producers Oil Corp., supra, repudiated former decisions seriously limiting state and federal power to tax. See, also, Metcalf & Eddy v. Mitchell, 269 U.S. 514, and James v. Dravo Contracting Co., 302 U.S. 134. The trend of these cases should not now be reversed."

No specific exemption is available to the Confederated Tribes or to individual Indians on the Flathead Reservation. No exemption by implication should be permitted.

3.

The District Court erred in holding it had jurisdiction to enjoin enforcement of tax laws of the State of Montana notwithstanding the prohibition against such injunction in 28 U.S.C § 1341.

28 U.S.C. § 1341 contains a specific prohibition against the exercise of federal district court jurisdiction to enjoin the collection of taxes imposed under state law. Notwithstanding this prohibition the three-judge court concluded it had jurisdiction over both the claims of the Confederated Tribes and of the individual Indian members.[5]

Jurisdiction to entertain the Confederated Tribes' claim was premised on a determination by the three-judge court that the Tribes were within the federal instrumentality exception to 28 U.S.C. § 1341. Jurisdiction over the individual tribal members' claims was based on the Civil Rights Act, 28 U.S.C. § 1343 and 42 U.S.C. § 1983. The court erred in both conclusions.

As noted by the three-judge court this Court and the lower federal courts have carved an exception to the jurisdictional prohibition of 28 U.S.C. § 1341 to permit suit in the federal district courts in those instances where the particular interests of the United States are involved. *Department of Employment v. United States,* 385 U.S. 355 (1966), *United*

[5]In reaching this conclusion the three-judge court assumed the state court remedy to be adequate (App. p. 77). State law remedies were nevertheless "plain, speedy and adequate". An aggrieved taxpayer has the right to secure independent review of his taxation under Article VIII, Sec. 7 of the 1972 Montana Constitution. The review procedure is detailed by R.C.M. 1947, Sec. 84-601 to -607, -708, -709, and -709.1. Montana law also provides a specific remedy when, as in the case below, a party alleges the illegality of a state tax. R.C.M. 1947, Sec. 84-4502. Additionally, R.C.M. 1947, Sec. 84-4505 permits injunctive relief against the collection of a tax where the tax or part thereof sought to be enjoined is illegal or the property is exempt from taxation. Similar procedures have been held to affort adequate relief to complaining taxpayers. *Bussie v. Long,* 383 F.2d 766 (5th Cir. 1967); and *Non-Resident Taxpayers Ass'n v. Municipality of Philadelphia,* 478 F.2d 456 (3rd Cir. 1973).

States v. Arlington County, Commonwealth of Virginia, 326 F.2d 929 (4th Cir. 1964), *Agua Caliente Band of Mission Ind. v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971) cert. denied, 405 U.S. 933 (1972). Having noted this exception the three-judge court went on to conclude that the United States had a "real and significant interest" in the Confederated Tribes and that they were embraced by the federal instrumentality doctrine. (392 F.Supp. at 1303; App. p. 43-44)

The district court's expansion of the federal instrumentality concept to embrace an entity in which the United States had a "real and significant interest" is unwarranted and contrary to the pronouncements of this Court in *McClanahan v. State Tax Comm'n of Arizona, supra,* and *Mescalero Apache Tribe v. Jones, supra. McClanahan* and *Jones* declared that an Indian tribe was not a federal instrumentality exempt from state taxation. In *Jones,* Mr. Justice White speaking for the Court noted:

> "The intergovernmental-immunity doctrine was once much in vogue in a variety of contexts, and with respect to Indian affairs, was consistently held to bar a state tax on the lessees of, or the product or income from, restricted lands of tribes or individual Indians. The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and reflected in Helvering v. Mountain Producers Corp., 303 U.S. 376, (1938); Oklahoma Tax Comm'n v. United States, 319 U.S. 598, (1943); and Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949), where the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them — were as a matter of constitutional law — automatically exempt from state taxation.

***

> The Indian Reorganization Act of 1934 neither requires nor counsels us to recognize this tribal business venture as a federal instrumentality. Congress itself felt it necessary to address the immunity question and to provide tax immunity to the extent it deemed desirable. There is, therefore, no statutory invitation to consider projects undertaken pursuant to the Act as federal instrumentalities generally and automatically immune from state taxation." (411 U.S. at 150-151)

The activities of the Confederated Tribes involved in the cases at bar — leases of real property for private commercial venture and ownership of personal property, particularly motor vehicles used on and off the reservation — are less protected than those found in *Jones* to be insufficient to involve the federal instrumentality doctrine. The activities of the Tribes upon which the claim of exemption is founded are, as in *Jones,* proprietary rather than governmental in nature. Such proprietary undertakings do not bring into play the federal instrumentality exception. Cf. *Federal Compress & Warehouse Co. v. McLean,* 291 U.S. 17 (1934).

The stated grounds for upholding jurisdiction on behalf of the individual Indian plaintiffs was 42 U.S.C. § 1983 and its jurisdictional counterpart 28 U.S.C. § 1343 providing for jurisdiction in district courts to "redress the deprivation***of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens". The three-judge court resolved the conflict between the language of 28 U.S.C. § 1343 which seemingly grants jurisdiction and the absolute prohibition against jurisdiction in 28 U.S.C. § 1341 in favor of the claimants.

A contrary result was reached by the Second and Fifth Circuits in *American Commuters Association, Inc. v. Levitt,* 405 F.2d 1148 (2nd Cir. 1969) and *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972). The Fifth Circuit in *Bland v.*

McHann faced the issue squarely and concluded that 28 U.S.C. § 1343 and 42 U.S.C. § 1983 did not carve an exception to the prohibition against suit in § 1343. In reaching its decision the Court stated:

> "It is well established that § 1341 is an explicit congressional limitation on the jurisdiction of the federal courts which would enjoin, suspend or restrain state tax levy, assessment or collection. Taxpayers seek to circumvent § 1341 by arguing that relief under § 1983 is supplemental and is not limited to any requirement of exhaustion of state remedies. We do not disagree with the general rule that exhaustion is not required in § 1983 cases; however, in this case § 1983 collides full force with a specific congressional limitation on federal jurisdiction. In such circumstances we are convinced that § 1341 must prevail.
>
> The Second Circuit has squarely confronted and resolved this clash. In American Commuters Ass'n v. Levitt, the court totally rejected the claim that § 1983 somehow provided an exception to the clear limitations of § 1341: [C]onsidering the special attention courts have always shown to tax matters even when constitutional rights are involved..., plus the unequivocal congressional statement set forth in § 1341, we conclude that when there are adequate state remedies available, § 1341 means what it so plainly says and that federal jurisdiction is still precluded by it." (footnotes omitted) (463 F.2d at 24)

In *Bland* the complaining taxpayers were Negroes charging that increases in property tax assessments "were solely the result of racial discrimination and were in retaliation for prior demonstrations". (463 F.2d at 23) Here the individual plaintiffs are Indians. To allow an exception for one ethnic minority, Indians, and to deny a similar exception to another minority, Blacks, is, we suggest, a distinction repugnant to our system. The express statutory

prohibition of 28 U.S.C. § 1341 should be held to bar the claim of the individual Indians as well as that of the Confederated Tribes.

4.

The State of Montana has jurisdiction over individual Indian citizens who are members of the Confederated Salish and Kootenai Tribes residing on the Flathead Reservation to require precollection of state cigarette taxes on sales of cigarettes to non-Indians.

The arguments presented in support of the state's appeal require affirmation of the three-judge court's ruling that the State of Montana may require precollection of state taxes on sales of cigarettes made to non-Indian purchasers. Independent grounds further support the decision of the district court.

The taxes imposed by Montana under R.C.M. 1947 Sec. 84-5606(1) are "conclusively presumed to be direct taxes on the retail customer precollected for the purpose of convenience and facility only". It is not the Indian retailer who pays the tax but the non-Indian consumer. In the instant case the record establishes that the Indian retailer obtained cigarettes from the wholesaler and sold them without state tax stamps affixed. Thus, there was not in fact a prepayment requirement by the retailer in order to obtain inventory for resale.

The individual Indian retailers are not licensed Indian traders comparable to those in *Warren Trading Post v. Arizona Tax Comm'n supra*. The proprietors operated the retail outlets as private entrepreneurs rather than as federal licensees.

Sales to non-Indians are not required. The entire "smoke shop" venture was and remains a private commercial undertaking for individual profit. It is neither a tribal venture nor an enterprise for the benefit of the Confederated

Tribes as an entity. Tribal self-government intended for protection by *Williams v. Lee*, 358 U.S. 217 (1959) simply is not involved. Tribal self-government principles are not brought into play by sales of cigarettes to non-Indian purchasers.

Sales to non-Indians without collection of the tax invites violation of criminal law by the non-Indian purchaser (R.C.M. 1947, Sec. 84-5606.18, App. p. 222). Neither *McClanahan v. State Tax Comm'n of Arizona, supra*, nor any other decision of this Court suggests that such a result would find judicial acceptance.

CONCLUSION

It is respectfully submitted that (1) those portions of the judgment in the cigarette tax case enjoining the State of Montana from collecting certain cigarette excise taxes and cigarette dealer's license taxes on the Flathead Reservation, and (2) the judgment in the personal property tax case enjoining the State of Montana from collecting personal property taxes from tribal members residing on the Flathead Reservation should be reversed and the causes dismissed.

It is further submitted that the portion of the judgment in the cigarette tax case permitting the State of Montana to require tribal members who sell cigarettes on the Flathead Reservation to precollect state cigarette excise taxes on sales of cigarettes to non-Indian purchasers should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, SAM E. HADDON, one of the attorneys for the Appellants certify that on the 18th day of November, 1975, I served three copies of the foregoing BRIEF FOR THE APPELLANTS on each of the counsel for Appellants herein by mailing true copies thereof, first class postage prepaid as follows:

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Supreme Court, U. S.
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IN THE

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OF THE

UNITED STATES

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INDEX

		Page
I.	INTEREST OF AMICUS CURIAE	1
II.	ARGUMENT IN SUPPORT OF POSITION OF THE STATE OF MONTANA	4
	A. Do The States Possess Residual Jurisdiction Over Indians On Indian Reservations?	6
	B. The Indians And Indian Tribal Organizations Have The Burden Of Establishing That A Specific Federal Statute Or Treaty Provision Or Constitutional Provision (State Or Federal) Entitles Them To The Exemptions From State Excise Taxes Which They Claim	22
	C. Any Rights That The Indian Tribes Have Under The Treaties, Statutes and Executive Orders Creating The Reservation Are Subject To Change By Subsequent Federal Legislation	24
	D. The Principle Of Implied Governmental Immunity Is Not Applicable In Resolving Excise Tax Questions Involving Indian Commercial Activities With Non-Indians	30
CONCLUSION		31
CERTIFICATE OF MAILING		35

TABLE OF CASES

The Cherokee Tobacco, 78 U.S. 616 (1871) 25, 26, 27
Choteau v. Burnet, 283 U.S. 691, 75 L.Ed. 1353, 51 S.Ct. 598 (1931) 23
The Clinton Bridge, 77 U.S. 454 (1870) 26
Draper v. United States, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107 (1896) 10, 18, 28
Fong Yue Ting v. United States, 149 U.S. 698 (1893) 28
Foster v. Neilson, 27 U.S. 252 (1828) 26
Helvering v. Mountain Producers Corp., 303 U.S. 376, 82 L.Ed. 907, 58 S.Ct. 623 (1938) 31
Kake v. Egan, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562 (1962) 9, 10, 18
Kansas Indians (Blue Jack v. Johnson), 72 U.S. 737, 18 L.Ed. 667 (1866) 7, 10, 27
Kennerly v. District Court of Montana, 440 U.S. 432, 27 L.Ed. 507, 91 S.Ct. 480 (1971) 19, 20
Langford v. Monteith, 102 U.S. 145, 26 L.Ed. 53 (1880) 10

Page

Leahy v. State Treasurer, 297 U.S. 420, 80 L.Ed. 771, 56 S.Ct. 507 (1936) 23
McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973)....7, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 30, 32, 33
Mescalero Apache Tribe v. Jones, 411 U.S. 145, 36 L.Ed.2d 114, 93 S.Ct. 1267 (1973)..17, 18, 19, 20, 22, 23, 29, 30, 31, 33
New York Indians (Fellows v. Denniston), 72 U.S. 761, 18 L.Ed. 708 (1868) 7
New York ex. rel. Ray v. Martin, 326 U.S. 496, 90 L.Ed. 261, 66 S.Ct. 307 (1946) 9, 16, 18
Oklahoma Tax Commission v. United States, 319 U.S. 598, 87 L.Ed. 1612, 63 S.Ct. 1284 (1943).....22, 31
Oklahoma Tax Commission v. Texas Co., 336 U.S. 342, 93 L.Ed. 721, 69 S.Ct. 561 (1949) 23, 31
Squire v. Capoeman, 351 U.S. 1, 100 L.Ed. 883 (1955)..... 23
Surplus Trading Co. v. Cook, 281 U.S. 647, 74 L.Ed. 1091, 50 S.Ct. 455 (1930) 9, 16
Taylor v. Morton, 67 U.S. 481 (1862) 26
Tonasket v. State, 79 Wn.2d 607, 488 P.2d 281 (1971), judgment vacated 411 U.S. 451 (1973) 3, 5
United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869 (1882) 10, 27
United States v. McGowan, 302 U.S. 535, 82 L.Ed. 410, 58 S.Ct. 286 (1938) 9, 16
United States v. Ward, cited in United States v. McBratney, 104 U.S. at 625 27
United States v. Washington, 496 F.2d 920 (C.A. 9, 1974). 2
Ward v. Race Horse, 163 U.S. 501 (1896) 28
Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1962).... 21
Ex Parte Webb, 225 U.S. 663 (1912)..... 28
Williams v. Lee, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959) 9, 13, 14, 15, 18
Worcester v. Georgia, 31 U.S. 515, 8 L.Ed. 483 (1832) 7, 10, 11, 13, 14, 16

WASHINGTON STATUTES

RCW 37.12.010 .....3, 4
RCW 82.24.260 5
Chapter 22, Laws of 1975, 1st Ex. Sess..... 5

FEDERAL STATUTES

Page

Act of Congress of March 3, 1875, 18 Statutes at Large 474. 27
An Act Imposing Taxes on Distilled Spirits, July 20, 1868. 25
Arizona Enabling Act, 36 Stat. 557, 569 28
The Buck Act, 4 U.S.C. § 104, et seq..... 30
The Indian Traders Act, 25 U.S.C. §§ 261-264 30
Public Law 83-280, 18 U.S.C. 1151 4

FEDERAL TREATIES

Treaty of Hopewell of 1785 8
Treaty of 1866 Between United States and Cherokee Indian Nation, Article X 25
Treaty of 1868 Between United States and Navajo Indian Nation, 15 Stat. 667, 668 19

OTHER AUTHORITIES

Cohen, Felix S., Handbook of Federal Indian Law (1971) 11, 12
Department of Commerce, Federal and State Indian Reservations and Indian Trust Areas, pp. 531-577 (G.P.O. 1974) 1, 2

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BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF POSITION OF THE STATE OF MONTANA

I.
INTEREST OF AMICUS CURIAE

There are twenty-two Indian reservations within the State of Washington.[1] These reservations vary

[1]Department of Commerce, *Federal and State Indian Reservations and Indian Trust Areas*, p. 531-577 (G.P.O. 1974)

greatly both in size and in the number of Indians living thereon.

At one end of the spectrum is the Yakima Reservation, consisting of approximately 1.1 million acres of tribally owned and allotted land.[2] There are approximately 5,000 enrolled members of the Yakima Nation.[3] At the other end of the spectrum is the Puyallup Reservation, encompassing 33 acres of land,[4] most of which is used as an Indian cemetery and as a location for a cigarette shop. There are approximately 171 Indians residing on or near the reservation.[5] (While the original reservation consisted of 18,000 acres, and has not been terminated, *U. S. v. Washington,* 496 F.2d 620 (C.A. 9, 1974) all but the 33 acres have been alienated to non-Indians.)

Both of these reservations, however, share with each other, and with most of the twenty other reservations, a common characteristic: they are located in close proximity to major population centers and major highways. Further, in the case of the two largest reservations, the Yakima Reservation and the Colville Reservation, the exterior boundaries of the reservation encompass sizable cities, with predominantly non-Indian populations.

Thus, it is hardly surprising that there are approximately 65 Indian smoke shops located on 17 different reservations in the state of Washington. The present annual loss from these smoke shops in

[2]Ibid, p. 575
[3]Ibid, p. 576
[4]Ibid, p. 556
[5]Ibid, p. 557

cigarette tax and retail sales tax is approximately $8 million.

As would be expected, the state of Washington is in litigation with most of the Indian tribes in the state on the question of the status of the tribe and its members under the cigarette tax, the retail sales tax, and other state excise taxes. A list of pending cases was attached as Appendix B to the Brief For The States of Washington and Idaho as Amici Curiae in Support of Jurisdictional Statements. The disposition of the two Montana cases at bar by this Court will no doubt have a significant impact upon all of these pending cases.

These tribes and the reservations they occupy generally fall into two categories, so far as the application of Public Law 83-280 is concerned. Approximately half of them fall into the category exemplified by the Colville Tribe on the Colville Reservation, which was involved in *Tonasket v. State,* 79 Wn.2d 607, 488 P.2d 281 (1971), judgment vacated, 411 US 451 (1973). The tribes in this category have requested that the state assume the full extent of jurisdiction permissible under PL 83-280, and the state has done so.

The other half of the tribes have not requested that the state assume such jurisdiction, and, pursuant to RCW 37.12.010, the state has assumed a relatively limited jurisdiction. This limited jurisdiction, as it applies to Indians on tribal or allotted lands held in trust or restricted as to alienation, covers

only eight specified subject matters. These eight enumerated subject matters are similar to the subject matters with respect to which jurisdiction was assumed over the Flathead Reservation in the case at bar. Thus, the Washington reservations in this second category are similar to the Flathead Reservation, so far as the application of PL 83-280 is concerned.[6]

The Washington retail sales tax and the Washington Cigarette Tax are similar to the Montana cigarette tax, in that the legal incidence of the tax is on the retail buyer, with the seller acting as a collecting agent.[7]

II.

ARGUMENT IN SUPPORT OF POSITION OF THE STATE OF MONTANA

At the outset, as indicated in the Brief For the States of Washington and Idaho As Amici Curiae In Support of Jurisdictional Statements, pp. 9-19,

[6]RCW 37.12.010 provides as follows:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 3, Laws of 1963 had not been enacted.

Neither the subject matters involved in the Montana assumption of jurisdiction nor those involved in the assumption of jurisdiction by Washington with respect to the second category of reservations expressly cover the subject matter of taxation.

[7]In Chapter 22, Laws of 1975, 1st Ex. Sess., the Washington State Legislature amended its cigarette tax statutes in two important respects. First, it eliminated the two-carton exemption contained in RCW 82.24.260 (section 7, chapter 157, Laws of 1972, ex. sess.), which was one of the provisions which was relied upon by this Court in remanding *Tonasket v. State* back to the Washington State Supreme Court. (411 US 451). RCW 82.24.260 was further amended to provide that, with certain exceptions, the state cigarette tax is a consumer-type tax, similar to the Montana cigarette tax involved in the case at bar, when the cigarettes being sold by the retailer are unstamped.

the State of Washington agrees with all the arguments advanced by the State of Montana in support of its position in the two cases at bar. In the most general sense, the cases at bar involve the necessity of determining the nature and extent of states' jurisdiction to impose state taxes upon Indians engaged in various activities from locations on trust or restricted land within the exterior boundaries of an established Indian reservation. While the State of Washington is fully supportive of Montana in the two cases at bar, the focus of this Brief will be on the issue of state power to impose state excise tax upon Indians who engage in commercial activities with non-Indians from business locations within Indian reservations. Rather than simply restating the underlying arguments, the object of this Brief will be to consider the question of the scope of any Indian immunity from state taxation stemming from the dotcrines of Indian sovereignty, federal preemption, and implied governmental immunity.

In short, we believe such a consideration strongly supports the proposition that in circumstances such as those involved with Montana and the Flathead Reservation as well as with the State of Washington and various of the Indian reservations located within it, there is no valid basis for denying states' jurisdiction to impose excise taxes upon Indians engaged in commercial activities with non-Indians at business locations within the exterior boundaries of an Indian reservation.

A. Do The States Possess Residual Jurisdiction Over Indians On Indian Reservations?

It is the basic position of Indian counsel that the states have no residual jurisdiction over Indians within the exterior boundaries of an Indian reservation. This issue involves the fundamental relationship between Indians as residents and citizens of the states in which they reside and Indian reservations as part of the specific territory of the states. There are divergent lines of United States Supreme Court decisions dealing with this question. It however lies at the heart of state tax jurisdiction over reservation Indians in areas not preempted by Congress. Imposition of state cigarette taxes and other excises on Indians conducting business with non-Indians within the exterior boundaries of an Indian reservation on trust of restricted lands depends on the inherent jurisdiction of the sovereign states tested against federal preemption, Indian treaties and Indian sovereignty.

This question may be broken down for answer into two subsidiary questions, namely: (1) Are reservations within the territorial limits and jurisdiction of the states; and (2) If they are, to what extent do the doctrines of Indian sovereignty and federal preemption (federal legislation including treaties and enabling act restrictions) remove the reservations from state jurisdiction?

In attempting to give some definitive answer to this question, it is important to note that the decisions of this Court have taken divergent viewpoints on this issue. Premised on the early cases of *Worcester v. Georgia* (US), 31 U.S. 515, 8 L.Ed. 483 (1832); *Kansas Indians (Blue Jacket v. Johnson)* (US), 72 U.S. 737, 18 L.Ed. 667 (1866); *New York Indians (Fellows v. Denniston)* (US) 72 U.S. 761, 18 L.Ed. 708 (1868) and *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 36 L.Ed.2d 129, 93 S.Ct. 1257 (1973) the argument is made on behalf of the Indians that the states have no jurisdiction over Indian reservations except as expressly authorized by Congress. This argument is best expressed in terms of geography, that is, an Indian reservation is "off limits" to state jurisdiction.

In applying the principles of *Worcester v. Georgia, supra, Kansas Indians, supra,* and *New York Indians, supra,* in cases such as *McClanahan,* this Court did not note the differences between the treaties involved in those early cases and in later cases such as *McClanahan.* In *Worcester* the pro-

visions of several treaties between the United States and the Cherokee Indian Nation expressly denied any jurisdiction in Georgia over the territory of the Indian Nation. In a very real and express sense, the Cherokee lands were not a part of the State of Georgia. The original treaty (the treaty of Hopewell formed on November 28, 1785) agreed upon "the boundary line between the Cherokees and citizens of the United States." Subsequent treaties carried the same stipulation. These treaties were entered into as a result of hostilities where sections of territory were procured and boundaries agreed upon between the Cherokee Nation and the United States. The purpose of the Georgia Act declared unconstitutional was to add Cherokee territory to the boundaries of the State of Georgia. As indicated by this Court at 31 U.S. 582:

> "By the act of cession, Georgia designated a certain line as the limit of that cession, and this line, unless subsequently altered, with the assent of the parties interested, must be considered as the boundary of the State of Georgia."

Thus, a non-Indian going on the reservation was not subject to state jurisdiction. The same was true in reference to the treaties involving the Kansas Indians and the New York Indians. Thus, with due respect to the decisions of this Court, it is not so much that the principles of *Worcester v. Georgia* have been changed by subsequent cases. Rather, what has been changed are the rights guaranteed to the Indians by federal legislation of which treaties are

only a part. It is equally interesting to note that even in these early cases the court was not unaware of the problems that might result when the Indian reservation communities became intermingled with lands and communities over which the Indians had no jurisdiction. In fact, the treaties which set apart lands for the Indians at a place distant to the white man's settlements were in specific response to these problems.

In circumstances where "Indian country" was not excluded by treaty from the territory of the states, the cases have generally held that "Indian country" is not "off limits" to state jurisdiction. *Kake v. Egan*, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562 (1962); *Surplus Trading Co. v. Cook*, 281 U.S. 647, 74 L.Ed. 1091, 50 S.Ct. 455 (1930); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 90 L.Ed. 261, 66 S.Ct. 307 (1946); *United States v. McGowan*, 302 U.S. 535, 82 L.Ed. 410, 58 S.Ct. 286 (1938); and *Williams v. Lee*, 358 U.S. 217, 3 L.Ed.2d 251, 79 S.Ct. 269 (1959).

Thus, in *State of New York ex rel. Ray v. Martin, supra*, this Court noted:

> "* * * in the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries. * * *" (326 U.S. at 499, quoted with approval in *Kake v. Egan*, 369 U.S. at 74.)

Again, as stated in *United States v. McGowan, supra*:

> "Enactments of the Federal Government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the Federal enactments." (302 U.S. 539)

In *Kake v. Egan*, this Court discarded the general notion expressed in *Worcester v. Georgia* and *Kansas Indians* that an Indian reservation is a distinct nation within whose boundaries state law cannot penetrate. It there noted:

> "* * * that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law. * * *" (369 U.S. at 72-73)

If this were not true, cases such as *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882), and *Draper v. United States*, 164 U.S. 240, 41 L.Ed 419, 17 S.Ct. 107 (1896) which upheld state jurisdiction would have been erroneously decided.

In sum, Indian reservations are not "off limits" in a territorial sense unless they are excluded from state boundaries by state enabling legislation such as before this Court in *Worcester v. Georgia*. (See for example, *Langford v. Monteith*, 102 U.S. 145, 26 L.Ed. 53 (1880).)

The State of Washington urges that the referred to cases indicating that Indian territory is part of a state for jurisdictional purposes point out the proper direction and focus for inquiry. The states do have *territorial* (geographical) jurisdiction. The

sole question is whether the states have *subject matter* jurisdiction. This depends on the limitations imposed by federal law including treaties and state enabling legislation and what remains of notions of Indian sovereignty. These cases further indicate that where jurisdiction has not been preempted by the Congress, the states do in fact have residual jurisdiction. Thus, jurisdiction not exercised by the federal government is not in the Indian tribes as sovereign nations but rather in the states as sovereign states. This principle has been modified, however, by other notions of Indian sovereignty.

One of the most troublesome problems confronting the states in application of their excise taxes to commercial activites of Indians on Indian reservations is what has been referred to as "platonic notions" of Indian sovereignty. Broadly speaking, the question is, what law governs: tribal law or self-government or state law, in the absence of controlling federal treaties or federal legislation? In Cohen's treatise on federal Indian law, the question of the scope of tribal self-government is discussed. F. S. Cohen, Handbook of Federal Indian Law, Chapter 7 (1971). Cohen there makes the claim based upon the principles announced in *Worcester v. Georgia, supra*, that those powers which are lawfully vested in an Indian tribe are not in general delegated powers granted by express acts of Congress, but are rather inherent powers of a limited sovereignty which has never been extinguished. This, of course, is the basic

claim of Indians and Indian tribal organizations. This line of reasoning would support the proposition that Indian tribal organizations within the exterior boundaries of an Indian reservation have jurisdiction not denied them by Congress by affirmative federal legislation.

Consistent with the principle that Indian reservations are within the territorial jurisdiction of the state unless expressly excluded therefrom by metes and bounds description or other language of like effect, the courts have uniformly upheld state jurisdiction over non-Indians dealing with non-Indians within the exterior boundaries of a reservation.

As stated in Cohen's Handbook of Federal Indian Law, *supra*, at page 121:

> "The mere fact that the locus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction where the parties involved are not Indians and the subject matter of the transaction is not a federal concern."

Inconsistent with this principle, even after Indians were made full-fledged citizens and residents of the states and Indian reservations were broken up as a result of allotment acts, the courts have denied state jurisdiction in some cases where transactions involved Indians where the doctrine of federal preemption would appear to have no application because of the absence of any controlling treaty or federal statute provision. On the other hand, in some cases where transactions involved Indians the court has granted jurisdiction. What were the controlling

considerations in these two types of cases is not clear from the reading of the decisions. It is difficult to ascertain to what extent, if any, the states have been denied state jurisdiction on the basis of the doctrine of Indian sovereignty rather than the application of the doctrine of federal preemption including the concomitant principle of implied governmental immunity. To the extent jurisdiction is denied on the basis of federal preemption or government immunity, there is a statutory and case law framework which can be applied to other circumstances and cases. However, there appear to be interwoven into the decisions denying state jurisdiction concepts of Indian sovereignty. Examples of this are *Williams v. Lee*, *supra*, and *McClanahan*, *supra*. In *Williams v. Lee*, *supra*, this Court, in commenting on the principles enunciated in *Worcester v. Georgia*, *supra*, stated:

> "* * * Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained. * * * Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. * * *" (358 U.S. at 219-220)

Since in *Williams v. Lee* there was (i) no absence of territorial jurisdiction such as that involved in *Worcester v. Georgia*, and (ii) no controlling fed-

eral statute that preempted jurisdiction, *Williams v. Lee* must of necessity be an implied immunity case stemming from application of the doctrine of Indian sovereignty.

The *McClanahan* case is difficult to analyze in reference to the question of Indian sovereignty. In *McClanahan, supra*, this Court initially noted that:

> "This case requires us once again to reconcile the plenary powers of the State over residents within their bodies with the semi-autonomous status of Indians living on tribal reservations. * * *" (411 U.S. 165)

In *McClanahan* this Court, after discussing the concept of Indian sovereignty stemming from *Worcester v. Georgia*, appropriately noted, in footnote 7 at 411 U.S. at 172, that the source of federal authority over Indian matters is the power the federal government derives from federal responsibility for regulating commerce with Indian tribes and for treaty making. After stating that a bar to state jurisdiction rested on federal preemption rather than the idea of inherent Indian sovereignty, it stated:

> "The modern cases thus tend to avoid reliance on Platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."

While in *McClanahan* this Court thus seemingly rejected Indian sovereignty as a controlling principle and sought to rely instead on relevant treaties and federal statutes, it further noted:

> "The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."

> * * * * *
>
> "When the relevant treaties and statutes are read with this tradition of sovereignty in mind, we think it clear that Arizona has exceeded its lawful authority by atempting to tax appellant." (411 U.S. 172, 173)

It is further interesting to note that this Court in *McClanahan* rejected the test in *Williams v. Lee, supra*, when applied to an Indian. Arizona took the position in *McClanahan* that imposition of its income tax on McClanahan did not interfere with reservation self-government. This Court noted in reference to this argument that:

> "In fact, we are far from convinced that when a state imposes taxes upon reservation members without their consent, its action can be reconciled with tribal self-determination. But even if the state's premise is accepted we reject the suggestion that the Williams test was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians." (411 U.S. at 179)

In the *McClanahan* case, this Court seemed to reject application of this principle to Indians by noting that McClanahan's "* * * activity is totally within the sphere which the relevant treaties and statutes leave for the federal government and for the Indians themselves."

The only apparent justification for this statement is the assumption that the Navajo reservation treaty provisions are not modified by subsequent federal legislation and that these treaty provisions place the Navajo reservation beyond state jurisdiction as pertains to Indians.

The question thus posed is whether *McClanahan* is expressing a line of decisions beginning with *Worcester v. Georgia* based on principles of Indian sovereignty stemming from treaty rights which is inconsistent with cases such as *Surplus Trading Co. v. Cook, supra; State of New York ex rel. Ray v. Martin, supra; United States v. McGowan, supra;* and *Kake v. Egan, supra.*

While it may be simple enough to state that Arizona lacked tax jurisdiction as pertains to Indians on the Navajo reservation, it leaves unanswered the jurisdiction of Arizona to administer and enforce those programs to which Indians are entitled to under due process and equal protection requirements. For example, does Arizona lack jurisdiction to enforce its statutes where an Indian erroneously or by fraud obtains financial assistance from Arizona such as Aid to Dependent Children? Obviously, it would be impossible to administer a program where Indians are concerned and to which benefits they are entitled as residents and citizens of the state without jurisdiction over the Indians to carry out the purposes of the program. Furthermore, if Arizona does not in fact have jurisdiction over Indians on the

Navajo reservation is there any basis in law and fact in assuming that Arizona has to assume any responsibility? Can Arizona in spite of the citizenship and residency of Navajo Indians and in spite of due process and equal protection requirements of the federal constitution deny the Navajo Indians the benefits conferred by Arizona on its own citizens and residents? In this connection it seems that the burdens should follow the benefits. Privileges and immunities of residence and citizenship ought to carry the duties and obligations of that residency and citizenship. This Court has never really addressed itself to this problem but rather has assumed that the benefits of all state laws including various services are not applicable to Indians. In *McClanahan* this Court said that the Navajo Indians received some state services. The answer to that is that they receive all state services the same as any other resident or citizen. The only thing exclusive about the Navajo Tribe is the exercise of self-government comparable to local self-government granted municipalities, counties, etc.

The significance of the *McClanahan* case was considered by this Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 36 L.Ed.2d 114, 93 S.Ct. 1267 (1973). This Court in *Mescalero* rejected the broad assertion that the federal government has exclusive jurisdiction over the tribe for all purposes whether the tribal enterprise is located on or off tribal land. In so doing, it significantly noted that any such generalization

"* * * has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. See *McClanahan v State Tax Comimssion of Arizona*, 411 US 164, 36 L Ed 2d 129, 93 S Ct 1257, *Organized Village of Kake v Egan*, 369 US 60. 71-73, 7 L Ed 2d 573, 82 S Ct 562 (1962). The upshot has been the repeated statements of this Court to the effect that even on reservations state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. *Organized Village of Kake, supra*, at 75, 7 L Ed 2d 573; *Williams v Lee*, 358 US 217, 3 L Ed 2d 251, 79 S Ct 269 (1959); *New York ex rel. Ray v Martin*, 326 US 496, 499, 90 L Ed 261, 66 S Ct 307 (1946); *Draper v United States*, 164 US 240, 41 L Ed 419, 17 S Ct 107 (1896). Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and *McClanahan v State Tax Commission of Arizona, supra*, lays to rest any doubt in this respect by holding that such taxation is not permissible absent congressional consent." (411 U.S. at 148)

If the above interpretation of *McClanahan* holding is correct, it would indicate that jurisdiction was denied on the basis that under the Navajo treaty the reservation was set aside for the use and occupation of the Navajo Tribe of Indians and that " 'no persons except those herein authorized to do, and

except such officers, soldiers, agents, and employes of the government, or of the Indians, as may be authorized to enter Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.' 15 Stat. 667, 668 (1868)." (411 U.S. at 174)

Since this Court found no specific treaty or statute which granted tax immunity apart from that implied from the treaties setting he Navajo reservaion apart for the exclusive jurisdiction of the Indians, it is fair to conclude that the *McClanahan* reservation source income tax exemptions stem solely from inherent sovereignty this Court found by application of the treaty provisions peculiar to the traditional notion of Navajo Indian sovereignty. In this connection, this Court did not consider the effect, if any, of the general allotment act on Arizona's jurisdiction within the exterior boundaries of the Navajo Indian Reservation nor the effect of conferring citizenship on McClanahan.

Thus, in spite of the language in *McClanahan* and the test asserted to be applicable in *Mescalero*, it seems that the question concerning inherent Indian sovereignty must still be faced. This statement is based upon the proposition that this has implied immunity even though it was not an immunity granted by any federal legislation or express treaty.

In this connection *Kennerly v. Dist. Court of Montana*, 440 U.S. 432, 27 L. Ed.2d 507, 91 S.Ct.

480 (1971) bears consideration. In the *Kennerly* case this Court invalidated tribal legislation which authorized state civil court jurisdiction. *Kennerly* seems to suggest that tribal sovereignty is somehow bestowed by the Congress and not something inherently reserved to the Indian tribes. It is further interesting to consider the *Kennerly* case in light of the fact that federal jurisdiction over Indians has repeatedly been said to stem from its power to regulate commerce with Indian tribes and to make treaties. In other words, is Indian sovereignty something granted by the federal government by treaty or Indian trade regulation rather than an exercise of residual powers in the tribes?

In light of the *Kennerly* case and the controlling principles enunciated by this Court in *McClanahan*, *supra*, and *Mescalero*, *supra*, it appears that Indian sovereignty or Indian right to self-government must be tested against federal legislation including treaties in terms of what is taken from the states by Congress and lodged either in the federal government or the Indian tribes, rather than to proceed on the assumption that Indian tribes are sovereign within the exterior boundaries of an Indian reservation except to the extent that sovereignty is impinged upon by express federal legislation.

In the case at bar, the court below upheld Montana's cigarette excise tax to the extent it required a member of the tribe (Wheeler) to collect a cigarette use tax on sales to non-Indian consumers. The tribal

member conducted cigarette retail activities on trust land leased from the tribe within the exterior boundaries of the Flathead Reservation. In arriving at this result the court construed *McClanahan* as prohibiting Montana from subjecting Wheeler to the cigarette tax licensing requirements or collecting a use tax from Indian consumers. In upholding use tax collection by Wheeler from non-Indians the court framed the issue as

> "* * * does the established principle of federal pre-emption in taxation and regulations of Indian trading extend to the sale of cigarettes to non-Indians under this factual situation?"

In resolving this issue, the court distinguished *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 14 L.Ed.2d 165, 855 S.Ct. 1242 (1962), and noted that Indian country is within the general jurisdiction of the state. It found that the *subject matter* (use tax collection responsibility on sales to non-Indians) did not interfere with any expressed or known federal policy of protecting Indians on Indian reservations (federal preemption, implied governmental immunity or the tribe's right to self-government). It then concluded:

> "* * * Under these facts the Indian seller in selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit the State of Montana to require precollection of the tax imposed upon the non-Indians."

It is submitted that the Montana decision is proper as pertains to trade with non-Indians.

Important for our purposes here is the fact that the Montana District Court upheld state residual jurisdiction in the absence of conflicting federal legislation or policy. Also, the Montana District Court appropriately noted that the issue involving state taxation of activities by Indians with non-Indians is still an open question under United States Supreme Court decisions.

B. **The Indians and Indian Tribal Organizations Have the Burden of Establishing That a Specific Federal Statute or Treaty Provision or Constitutional Provision (State or Federal) Entitles Them to the Exemptions From State Excise Taxes Which They Claim.**

As in the residual jurisdiction area, there is here involved conflicting authority. One line of authority clearly indicates that the Indians are no different than anyone else when claiming exemption from state taxation. To establish this principle we need go no further than the following statement in *Mescalero*:

> "* * * absent clear statutory guidance, courts ordinarily will not imply tax exemptions * * *.
>
> "'This Court has repeatedly said that tax exemptions are not granted by implication * * *. It has applied that rule to taxing acts affecting Indians as to all others. * * * If Congress intends to prevent the State of Oklahoma from levying a nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences.' *Oklahoma Tax Comm'n v United States, supra*, 319 US, at 606-607, 87 L Ed 1612

(1943). See *Squire v Capoeman, supra*, 351 US, at 6, 100 L Ed 883. Absent a 'definitely expressed' exemption, an Indian's royalty income from Indian oil lands is subject to the federal income tax although the source of the income may be exempt from tax. *Choteau v Burnet*, 283 US 691, 696-697, 75 L Ed 1353, 51 S Ct 598 (1931). The Court has also held that a State, as well as the Federal Government, may tax an Indian's pro rata share of income from a tribe's restricted mineral resources. *Leahy v State Treasurer*, 297 US 420, 80 L Ed 771, 56 S Ct 507 (1936). Lessees of otherwise exempt Indian lands are also subject to state taxation. *Oklahoma Tax Comm'n v. Texas Co.*, 336 US 342, 93 L Ed 721, 69 S Ct 561 (1949).

* * * *

"* * * We therefore hold that the exemption in § 465 does not encompass nor bar the collection of New Mexico's nondiscriminatory Grass Receipts Tax and that the Tribe's ski resort is subject to that tax." (411 U.S. 156-158)

As otherwise stated in *McClanahan*:

> "It is true, of course, that exemptions from tax laws should, as a general rule, be clearly expressed." (411 U.S. 176)

At this point it seems incumbent upon the Indians to point to specific federal statutes or treaty provisions or state enabling legislation which would exempt Indians from state taxation such as legislation, including enabling acts, which exempt Indian restricted or trust lands from property taxation. This rule of exemption from state taxation, however, must be construed with the language in the *McClanahan* case that (i) state laws generally are not applicable

to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply; and (ii) Indians and Indian property on an Indian reservation are not subject to state taxation except by virtue of express authority conferred upon the states by act of Congress (411 U.S. 171).

It is extremely difficult to reconcile these different statements appearing in *McClanahan* and other Supreme Court decisions. Obviously, if the states do not have jurisdiction to tax Indians except as expressly conferred by Congress, the statements that tax exemptions must be expressed are not applicable to state taxation of Indians on Indian reservations.

Still, inasmuch as there is ample authority for the proposition that Indians are on no different footing than non-Indians pertaining to tax exemptions (granted *subject matter* jurisdiction), the states have ample basis to assert that Indians bear the burden of pointing to particular federal legislation or treaty provisions that confers the exemption. Neither general notions of Indian sovereignty, implied governmental immunity or federal preemption should control. This position is certainly compatible with the cases notwithstanding that immunity is implied in *McClanahan* from a series of considerations discussed by the court in the *McClanahan* case.

C. **Any Rights That the Indian Tribes Have Under the Treaties, Statutes and Executive Orders Creating the Reservation Are Subject to Change by Subsequent Federal Legislation.**

This is an important principle of constitutional law that the court completely neglected in its discussion of applicable principles in the *McClanahan* case.

In *Cherokee Tobacco v. United States*, 11 Wall. 616, 78 U.S. 227 (1871) this Court had before it the question of the application of the federal cigarette tax law on a reservation set aside for the Cherokee Nation of Indians. There was an apparent conflict between the provisions of Section 107 of the Internal Revenue Laws which imposed excise taxes within the exterior boundaries of the United States and the 10th Article of the Treaty of 1866 between the United States and the Cherokee Indian Nation. Article 10 provided that every Cherokee Indian was entitled to sell any merchandise or manufactured products free of any tax which "is now or may be levied by the United States on the quantity sold outside of the Indian territory." In disposing of this conflict, this Court first determined that the Cherokee Nation territory was part of the territory of the United States. Significantly, it noted the difficulties in application of the federal liquor and tobacco products excises if this were not the case.

In reference to the conflict between the Internal Revenue law as so construed and the Cherokee treaty provision the court held:

"It need hardly be said that a treaty cannot

change the Constitution or be held valid if it be in violation of that instrument. This results from the nature and fundamental principle of our government. The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress (*Foster v. Neilson*, 2 Pet., 314) and an act of Congress may supersede a prior treaty. *Taylor v. Morton*, 2 Curt., 454; *The Clinton Bridge*, 1 Woolw., 155. In the cases referred to, these principles were applied to treaties with foreign nations. Treaties with Indian nations within the jurisdiction of the United States, whatever considerations of humanity and good faith may be involved and require their faithful observance, cannot be more obligatory. They have no higher sanctity; and no greater inviolability or immunity from legislative invasion can be claimed for them. The consequences in all such cases give rise to questions which must be met by the political department of the government. They are beyond the sphere of judicial cognizance. *In the case under consideration the act of Congress must prevail as if the treaty were not an element to be considered.* If a wrong has been done, the power of redress is with Congress, not with the judiciary, and that body, upon being applied to, it is to be presumed, will promptly give the proper relief.

"Does the section thus construed deserve the severe strictures which have been applied to it? As before remarked, it extends the revenue laws over the Indian territories only as to liquors and tobacco. In all other respects the Indians in those territories are exempt. As regards those articles, only the same duties are exacted from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the

public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians? The frauds that might otherwise be perpetrated there by others, under the guise of Indian names and simulated Indian ownership, is also a consideration not to be overlooked." (78 U.S. at 229) (Text underscoring added.)

The same principle was applied by this Court in *United States v. McBratney*, 104 U.S. 621, 26 L.Ed. 869 (1882) in which it was held that the State of Colorado had exclusive jurisdiction to try a white man for murder of another white man within the boundaries of the Ute Indian Reservation. This Court there held that the act of Congress of March 3, 1875 admitting Colorado into the Union superseded any inconsistent provisions in prior legislation including Indian treaties. This Court there noted:

"* * * Whenever, upon the admission of a State into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. *Case of the Kansas Indians*, 5 Wall., 737 (72 U.S., XVIII., 6672; *U. S. V. Ward* (*supra*)]. The State of Colorado, by its admission into the Union by Congress, upon an equal footing with the original States in all respects whatever, without any such exception as had been made in the Treaty with the Ute Indians and in the Act establishing a territorial government, has acquired criminal jurisdiction over its own citizens and other white persons throughout the whole of the territory within its limits, including the Ute Reservation, and that reservation is no longer within the sole and exclusive jurisdiction of the United States." (104 U.S. at 624)

Many of the states, of course, stand on the same footing as Colorado.

This Court in *Ex Parte Webb*, 225 U.S. 663 (1912) said:

> "Of course, an act of Congress may repeal a prior treaty as well as it may repeal a prior act. *The Cherokee Tobacco*, 11 Wall. 616; *Fong Yue Ting v. United States*, 149 U.S. 698, 720; *Ward v. Race Horse*, 163 U.S. 501, 511; *Draper v. United States*, 164 U.S. 240, 243." (225 U.S. at 683)

If the fundamental principle alluded to above is followed, the effect of subsequent federal legislation on Indian treaty rights and on a state's tax jurisdiction must be taken into consideration. This Court in *McClanahan* did not reconcile the jurisdiction Arizona acquired under the enabling act by its admission to the Union and the jurisdiction it may have lacked at the time that the Navajo treaty was made with the Navajo Indians. Furthermore, it did not take into consideration various Indian allotment acts which would make a checkerboard of an Indian reservation and thus preclude the application of the doctrine of exclusive Indian or federal jurisdiction within the confines of an established Indian reservation. How can it realistically be said that Indians or the federal government have exclusive jurisdiction within the exterior boundaries of an Indian reservation unless there is an express grant of power to the states when as a matter of substance this power has already been granted the states by the doctrine of state sovereignty as part of the admission of states

to the Union on an equal footing with other states? If this principle were not applicable, discussion of the doctrine of federal preemption as pertains to states' power is meaningless. The doctrine of preemption is only applicable where both the states and federal government have concurrent jurisdiction absent a preemption of jurisdiction by Congress.

Furthermore, the jurisdiction admittedly conferred upon the states over land within the exterior boundaries of a reservation not held by trust or restricted deed would be invalidated since this jurisdiction is not expressly conferred by any federal legislation. There is no federal law that says that property within the exterior boundaries of an Indian reservation when acquired by a non-Indian or an Indian free of any restrictions is subject to state tax jurisdiction. However, this is the result. This consequence flows solely from the removal of federal restrictions contained in federal statutes, including treaty provisions, and not as a result of any express grant of authority by the Congress to the states. As indicated in the *Mescalero* case the source of federal power over Indians is its power to make treaties with the Indians and to regulate commerce with the Indian tribes. This was a power granted to Congress by the people and the states and the powers not granted to the federal government are automatically reserved to the states.

In sum, we submit that unless there is some express federal law enacted by Congress under its

treaty powers or under its power to regulate commerce with Indian nations which precludes state taxation, the states have jurisdiction to impose general excise taxes on Indians on an Indian reservation. This does not mean, of course, that this Court may not construe an enabling act or an act of Congress such as the Buck Act, 4 USC § 104, et seq., or the Indian Traders Act, 25 USC §§ 261-264, or Indian treaties which have not been modified by subsequent legislation, as constituting a source of Indian tax exemption. Obviously, this Court did so in *McClanahan*. In *McClanahan*, this Court analyzed the relevant treaties and statutes (read with the tradition of Indian sovereignty in mind) and concluded that "when Arizona's contentions are measured against these statutory imparities, they're simply untenable." However, the analytical basis for this conclusion is not set forth in that opinion.

D. **The Principle of Implied Governmental Immunity Is Not Applicable in Resolving Excise Tax Questions Involving Indian Commercial Activities With Non-Indians.**

Applicability of this doctrine was laid to rest by this Court in *Mescalero* wherein the opinion stated:

> "* * * The intergovernmental immunity doctrine was once much in vogue in a variety of contexts and, with respect to Indian affairs, was consistently held to bar a state tax on the lessees of or the product or income from restricted lands of tribes or individual Indians.

> The theory was that a federal instrumentality was involved and that the tax would interfere with the Government's realizing the maximum return for its wards. This approach did not survive; its rise and decline in Indian affairs is described and reflected in *Helvering v Mountain Producers Corp.*, 303 US 376, 82 L Ed 907, 58 S Ct 623 (1938); *Oklahoma Tax Comm'n v United States*, 319 US 598, 87 L Ed 1612, 63 S Ct 1284 (1943); and *Oklahoma Tax Comm'n v Texas Co.*, 336 US 342, 93 L Ed 721, 69 S Ct 561 (1949), where the Court cut to the bone the proposition that restricted Indian lands and the proceeds from them were—as a matter of constitutional law — automatically exempt from state taxation. Rather, the Court held that Congress has the power 'to immunize these lessees from the taxes we think the Constitution permits Oklahoma to impose in the absence of such action' and that '[t]he question whether immunity shall be extended in situations like these is essentially legislative in character.' *Oklahoma Tax Comm'n v Texas Co.*, supra, at 365-366, 93 L Ed 721." (411 U.S. at 150)

Furthermore, *Mescalero* establishes that the exempt status of land does not exempt an Indian tribe from excise tax responsibilities on business activities conducted on the exempt land.

CONCLUSION

The question of whether Indians or Indian tribal organizations are subject to state excise taxes on business activities conducted with non-Indians on restricted or trust lands within the exterior boundaries of an Indian Reservation has not yet been resolved by the Supreme Court of the United States.

This issue must be examined in light of the relationship in the federal system between the states and the federal government. Counsel for the Indians take the position that absent express federal legislation, *McClanahan* precludes state taxation. It is submitted that this reading of *McClanahan* does not square with fundamental constitutional principles and is negated by those United States decisions which uphold state tax jurisdiction in the absence of federal legislation and specific statutes which exempt Indian land.

Constitutionally speaking, the federal government is one of delegated powers. This power includes power to make treaties with Indian tribes and regulate Indian commerce. In all other respects, residual power over Indians as citizens and residents of the states and over Indian lands as part of the territory of the states is lodged in the states. Thus, in order to exclude Indian lands from state jurisdiction on admission of the states to the Union, it was necessary for Congress to except these lands from state jurisdiction. In order to determine state jurisdiction, then, it is not necessary to find a grant of jurisdiction by Congress, but rather to find federal legislation appropriately exercised under Congress' Indian treaty and commerce powers which restrict jurisdiction. Tested against this constitutional framework, federal legislation and treaty provisions must preclude tax jurisdiction. In this context, *McClanahan* stands for the proposition that Arizona was denied jurisdiction over Navajo Indians by treaty or the

Arizona Enabling Act since no other federal legislation precluded its exercise.

To reconcile *Mescalero* with *McClanahan*, a valid "on-reservation" versus "off-reservation" distinction must be found. Where reservations are broken up by the general allotment and other allotment acts and Indians are commingled with the rest of the non-Indian community, it would appear that *Mescalero* and not *McClanahan* should control state excise tax questions.

Beyond this, we submit that the present Indian tax controversies stem solely from the fact that Indians have been assimilated into the society as a whole on equal footing and in competition with non-Indians. It is paradoxical to affirm Indian dependency and separateness in circumstances where Indians are carrying on commercial activities which are completely integrated with the non-Indian community.

For all these reasons, as well as those advanced in the Brief of the State of Montana, the State of Washington respectfully urges this Court to uphold the position of Montana and deny that any Indian immunity from state taxation exists in the circumstances of this case.

DATED this 19th day of November, 1975.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RICHARD H. HOLMQUIST, one of the attorneys for the State of Washington, as amicus curiae, certify that on the 19th day of November, 1975, I served copies of the foregoing BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE STATE OF MONTANA on appellants and appellees herein by mailing true copies thereof, first class air mail postage prepaid as follows:

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Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1656

JOHN C. MOE, ET AL.,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL.,

Appellees.

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL.,

Appellants,

v.

JOHN C. MOE, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Montana

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, THE TREATY AND FEDERAL AND STATE STATUTES INVOLVED	3
QUESTION PRESENTED	3
STATEMENT OF THE CASE	4
A. Introduction	4
B. General Background	4
C. The Cigarette Tax Case—*Moe*	9
D. The Income Tax Case	12
E. The Personal Property Tax Case—*Montana*	13
SUMMARY OF ARGUMENT	14
ARGUMENT	16
I. *McCLANAHAN* v. *ARIZONA STATE TAX COMM'N* AND ITS CONTROLLING PRECEDENT CONTROL THE MERITS OF THESE CONSOLIDATED APPEALS, THUS IMMUNIZING THE TRIBAL PARTIES FROM ALL STATE TAXATION JURISDICTION HERE INVOLVED	16
A. The District Court Correctly Held That the State Lacked Jurisdiction to Impose Its Personal Property Taxes on Tribal Members Residing on the Reservation and That It Could Not Impose Its Cigarette Sales and Licensing Tax Laws on Those Members	17
B. The District Court Erred in Holding That Tribal Members Who Sell Cigarettes Must Precollect the Tax on Sales to Non-Indians	22

INDEX—Continued

	Page
C. The State's Lack of Authority to Tax Indians on the Flathead Reservation Is Jurisdictional, Based on the Constitution, Treaties and Applicable Federal Statutes and Does Not Involve Racial Discrimination	25
D. The District Court Properly Rejected the Argument That the General Allotment Act Gave Montana Jurisdiction Over Indians Holding Fee Patents	29
II. THE DISTRICT COURT CORRECTLY HELD THAT THE CASES BELOW WERE NOT BARRED BY 28 U.S.C. § 1341 AND THAT FEDERAL JURISDICTION EXISTS WITH RESPECT TO THE TRIBES PURSUANT TO 28 U.S.C. § 1362 AND THE INDIVIDUAL TRIBAL MEMBERS PURSUANT TO 28 U.S.C. § 1343 AND 42 U.S.C. § 1983	32
CONCLUSION	35
APPENDIX A	A-1
APPENDIX B	B-1
APPENDIX C	C-1

CITATIONS

CASES:

	Page
Agua Caliente Band of Mission Indians v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972)	16, 33
Carpenter v. *Shaw*, 280 U.S. 363 (1930)	18
Confederated Salish and Kootenai Tribes v. *The State of Montana*, Civil No. 2157 (D. Mont., filed May 17, 1972)	12
Confederated Salish and Kootenai Tribes v. *Moe*, 392 F. Supp. 1297 (D. Mont. 1975)	*passim*
Confederated Salish and Kootenai Tribes v. *State of Montana*, 392 F. Supp. 1325 (D. Mont. 1975)	*passim*
Department of Employment v. *United States*, 385 U.S. 355 (1966)	33
Kennerly v. *District Court*, 400 U.S. 423 (1971)	25
Kimball v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1975)	27
Mahoney v. *State of Idaho Tax Comm'n.*, 96 Ida. 59, 524 P.2d 187 (1974), *cert. denied*, 419 U.S. 1089 (1974)	22
Mattz v. *Arnett*, 412 U.S. 481 (1973)	7, 31
McClanahan v. *Arizona State Tax Comm'n.*, 411 U.S. 164 (1973)	*passim*
Menominee Tribe v. *United States*, 391 U.S. 404 (1968)	27
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973)	33
Morton v. *Mancari*, 417 U.S. 535 (1974)	15, 26, 29
Morton v. *Ruiz*, 415 U.S. 199 (1974)	18
Parker v. *Levy*, 417 U.S. 733 (1974)	29
Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968)	34
Secretary of the Navy v. *Avrech*, 418 U.S. 676 (1974)	29
Security State Bank v. *Pierre*, 162 Mont. 298, 511 P.2d 325 (1973)	21
Seminole Nation v. *United States*, 316 U.S. 286 (1942)	34
Seymour v. *Superintendent*, 368 U.S. 351 (1962)	7, 31
Squire v. *Capoeman*, 351 U.S. 1 (1956)	19

CITATIONS—Continued

	Page
State v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954)	21
Tonasket v. *State of Washington*, 84 Wash.2d 164, 525 P.2d 744, appeal dismissed for want of substantial question, 420 U.S. 915 (1975)	22
United States v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964)	16, 32, 34
United States v. *Burland*, 441 F.2d 1199 (9th Cir. 1971), *cert. denied*, 404 U.S. 842 (1971)	18
United States v. *Kagama*, 118 U.S. 375 (1886)	25
United States v. *Livingston*, 179 F. Supp. 9 (E.D. S.C. 1959), *aff'd*, 364 U.S. 281 (1960)	33
United States v. *Mazurie*, 419 U.S. 544 (1975)	15, 16, 29, 30
United States v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940)	16, 35
Village of Walthill v. *Omaha Tribe*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973)	29
Ward v. *Board of County Comm'rs.*, 253 U.S. 17 (1920)	24
Warren Trading Post Co. v. *Arizona Tax Comm'n.*, 380 U.S. 685 (1965)	23, 24
Williams v. *Lee*, 358 U.S. 217 (1959)	22, 23, 24
Worcester v. *Georgia*, 31 U.S. 515 (1832)	17

FEDERAL CONSTITUTION, TREATIES AND STATUTES:

United States Constitution, Art. I, sec. 8, cl. 3	10, 15, 26
Navajo Treaty of June 1, 1868, 15 Stat. 667	18
Treaty of Hell Gate of July 16, 1855, 12 Stat. 975	4, 18, 34
Arizona Enabling Act of June 20, 1910, 36 Stat. 557	19
Buck Act, 4 U.S.C. §§ 105 *et seq.* (1947)	20
Federal Power Act of June 10, 1920, § 10(e), 41 Stat. 1063, 1068-69, as amended, 16 U.S.C. § 803(e)	34

CITATIONS—Continued

	Page
General Allotment Act of February 8, 1887, § 6, 24 Stat. 388, as amended, 25 U.S.C. § 349	15, 29, 30, 31
Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*	6, 30, 31
Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564 *et seq.*	27
Menominee Restoration Act of December 22, 1973, 87 Stat. 770, 25 U.S.C. §§ 903 *et seq.*	27, 30
Menominee Termination Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. §§ 891 *et seq.*	27
Montana Enabling Act of February 22, 1889, 25 Stat. 676	5, 6, 19
Montana Territorial Act of May 26, 1864, 13 Stat. 85	5, 19
Act of March 3, 1885, 23 Stat. 362	31
Act of April 23, 1904, 33 Stat. 302	6
Act of March 4, 1909, 35 Stat. 1088	31
Act of June 28, 1932, 47 Stat. 336	31
Act of June 25, 1948, 62 Stat. 683	31
Act of May 24, 1949, 63 Stat. 89	31
Act of August 15, 1953, 67 Stat. 588 (Public Law 280)	3, 6, 10, 20, 28, 30
Act of April 11, 1968, 82 Stat. 73, 25 U.S.C. §§ 1321 *et seq.*	6, 28, 30
10 U.S.C., generally	29
18 U.S.C. § 1151	7, 31
18 U.S.C. §1154	30
18 U.S.C. § 1161	30
18 U.S.C. § 1162	6, 21,27
25 U.S.C., generally	29
25 U.S.C. § 349	29
25 U.S.C. § 461	31
25 U.S.C. § 462	31
25 U.S.C. § 1321	6, 21, 28
25 U.S.C. § 1322	6, 21, 28
25 U.S.C. § 1323	29
28 U.S.C. § 1253	3
28 U.S.C. § 1341	16, 32, 33, 34, 35

CITATIONS—Continued

	Page
28 U.S.C. § 1343	32
28 U.S.C. § 1360	6, 21, 27
28 U.S.C. § 1362	16, 32, 34, 35
28 U.S.C. § 2284	10, 13
42 U.S.C. § 1983	32
50 U.S.C., generally	29

STATE CONSTITUTION AND STATUTES:

Montana Constitution (1889), Vol. 1, Revised Code of Montana (R.C.M.) 1947 at 83	6
Montana Constitution, Ordinance I, sec. 2, (1889), Vol. 1, R.C.M. 1947 at 328	6, 19
Montana Constitution (1972), Vol. 1, R.C.M. 1947 (Supp. 1974 at 43)	6
Montana Constitution, Art. I (1972), Vol. 1, R.C.M. 1947 (Supp. 1974 at 44)	6
§ 53-114, R.C.M. 1947	13, 14
§§ 53-1025 to 53-1029, R.C.M. 1947	13
§§ 83-801 to 83-806, R.C.M. 1947	7
§ 84-201, R.C.M. 1947	13
§ 84-301, R.C.M. 1947	13
§ 84-404, R.C.M. 1947	13
§ 84-406, R.C.C. 1947	13, 14
§ 84-409, R.C.M. 1947	13
§ 84-410, R.C.M. 1947	13
§ 84-4201, R.C.M. 1947	13
§ 84-4202, R.C.M. 1947	13
§ 84-5606, R.C.M. 1947	9
§ 84-5606.3, R.C.M. 1947	9
§ 84-5606.10, R.C.M. 1947	9, 23
§ 84-5606.11, R.C.M. 1947	23
§ 84-5606.12, R.C.M. 1947	23
§ 84-5606.18, R.C.M. 1947	25
§ 84-5606.31, R.C.M. 1947	25

CITATIONS—Continued

CONGRESSIONAL MATERIALS:

	Page
H.R. Con. Res. 108, 67 Stat. B132 (1953)	28
H.R. REP. No. 93-572, 93d Cong., 1st Sess. (1973)	27
H.R. 7319, 83d Cong., 2d Sess. (1954)	28
S. REP. No. 93-604, 93d Cong., 1st Sess. (1973)	27
S. 2750, 83d Cong., 2d Sess. (1954)	28
Termination of Federal Supervision Over Certain Tribes of Indians, Joint Hearings on S. 2750 and H.R. 7319 Before the Subcommittee of the Committees of Interior and Insular Affairs, 83d Cong., 2d Sess. (1954)	28

MISCELLANEOUS:

Proclamation (Governor of Montana) of October 8, 1965	8
Tribal Ordinance 40-A (Revised), May 7, 1965	7, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1656

JOHN C. MOE, ET AL.,
Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL.,
Appellees.

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, ET AL.,
Appellants,

v.

JOHN C. MOE, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Montana

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BRIEF FOR THE APPELLEES (AND CROSS-APPELLANTS)

OPINIONS BELOW

These consolidated appeals arise from two separate suits decided by the same three-judge district court.

In *Confederated Salish and Kootenai Tribes, et al.* v. *Moe, et al.* (hereafter "the cigarette tax case" or "*Moe*"), the Opinion and Order and the Supplemental Opinion and Order of the district court (appendix to Appellants' Jurisdictional Statement ("App.") 37-71 and 11-35, respectively) are reported at 392 F. Supp. 1297. An earlier Memorandum Opinion is unreported (App. 73-86). The Memorandum of the Court accompanying its judgment also is unreported (appendix to Cross-Appellants' Jurisdictional Statement ("Cross-App.") 1a-2a).

In *Confederated Salish and Kootenai Tribes, et al.* v. *State of Montana, et al.* (hereafter "the personal property tax case" or "*Montana*"), the Order and Opinion of the district court (App. 3-10) is reported at 392 F. Supp. 1325.

JURISDICTION

The judgments of the court below in both *Moe* and *Montana* were entered on March 19, 1975 (App. 89-91 (*Moe*) and 93-95 (*Montana*)). Two groups of defendants in each case filed timely notices of appeal on May 6, 1975 (App. 99-102 (*Moe*) and 103-106 (*Montana*)), and on May 15, 1975 (App. 107-110 (*Moe*) and 111-114 (*Montana*)). A single jurisdictional statement for all defendants in both *Moe* and *Montana* was filed on June 30, 1975 (No. 74-1656).

Plaintiffs in *Moe*[1] filed on May 16, 1975, a timely notice of appeal of one issue in that case (Cross-App. 3a-4a). Their jurisdictional statement on cross-appeal

[1] Except for plaintiff Joseph Wheeler, who died during the litigation (392 F. Supp. at 1301, n. 4; App. 40, n. 4).

was filed on July 9, 1975 (No. 75-50). The Court noted probable jurisdiction on October 6, 1975, and the cases were consolidated.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS, THE TREATY AND FEDERAL AND STATE STATUTES INVOLVED

Appellees are not dissatisfied with the list of these laws which is cited in Appellants' brief ("App. Brf.") 3, and which are reprinted in the appendix to Appellants' Jurisdictional Statement (App. 115-end).[2]

QUESTION PRESENTED

Whether the State of Montana can constitutionally apply and enforce its personal property tax and cigarette sales tax and dealer licensing statutes and related regulations on federally recognized Indian tribes and their members residing on the Flathead Indian Reservation, when the state has not acted to assume specific jurisdiction to tax those tribes and their Indians pursuant to the Act of August 15, 1953, 67 Stat. 588 (Public Law 280), and when no other act of Congress otherwise authorizes the state to tax generally the tribes and their reservation members.

[2] Appendix pagination ceases with App. 133. The pages following, reprinting pertinent state statutes, either are unpaginated or carry the pagination from the page of the Montana Code from which taken. When citations are to the unpaginated pages, the citation will be as if paginated *seriatim* after App. 133, but the citation also will include in [ ]'s any page number from the Montana Code.

STATEMENT OF THE CASE

A. Introduction

Consolidated here are an appeal by the State of Montana, its Department of Revenue, and certain state and local officials from two separate judgments by a three-judge district court (App. 89-91 (*Moe*) and 93-95 (*Montana*) permanently enjoining imposition of certain state tax laws on members of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana (hereafter "Tribes" or "tribal parties"), residing on their Reservation, and an appeal by the Tribes and certain tribal members from the judgment of the court in *Moe* (App. 89-91) denying on the merits a permanent injunction prohibiting the imposition of certain tax laws on tribal members residing on the Reservation.

The first case, *Moe*, appealed by both the state and the Tribes, involves a challenge by the tribal parties to enforcement of the state cigarette sales tax and cigarette dealer licensing requirement as to tribal members transacting such business on the Reservation. The second case, *Montana*, from which only the state parties appeal, involves a challenge by the tribal parties to enforcement of the state personal property tax laws against tribal members residing on the Reservation.

B. General Background

The Salish, Kootenai and Upper Pend d'Oreille Indians ceded their vast aboriginal lands to the United States by the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975 (App. 117-124), save for a Reservation set aside and guaranteed by the United States for the "exclusive use and benefit" of the Tribes. Article II, 12 Stat. at 976 (App. 119). Their reserved lands are known now as the Flathead Indian Reservation, Montana. It was understood by the Indians when they signed the Treaty

that they should have exclusive use of their Reservation and that no "white man . . . [shall] be permitted to reside upon the said reservation without permission of the confederated tribes. . . ." Article II, 12 Stat. at 976 (App. 119). The federal-tribal exclusivity of the Reservation was preserved and underscored by Congress in the Montana Territorial Act of May 26, 1864, 13 Stat. 85,[3] and in the Montana Enabling Act of February 22, 1889, 25 Stat. 676,[4] which retained in the United States

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[3] "... *Provided, further,* That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to Indians in said territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but such territory shall be excepted out of the boundaries, and constitute no part of the Territory of Montana, until said tribe shall signify their assent to the President of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed." Sec. 2, 13 Stat. at 86.

"*And be it further enacted,* That all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territory embraced within the provisions of this act, shall be faithfully and rigidly observed, anything contained in this act to the contrary notwithstanding. . . ." Sec. 17, 13 Stat. at 91-92.

[4] "Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . . But nothing herein . . . shall preclude the said States from taxing as other lands are taxed any lands owned or held

[Footnote continued on page 6]

absolute jurisdiction over the persons and property of Indians and which required the state to disclaim all right, title and interest to the Indian lands within its borders. The state did so by the Montana Constitution, Ordinance I, sec. 2 (1889).[5] The Flathead Reservation was opened to settlement by the Act of April 23, 1904, 33 Stat. 302, as amended. The Tribes organized in 1935 pursuant to the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. §§ 461 *et seq.*

Congress, by the Act of August 15, 1953, 67 Stat. 588 (known generally as Public Law 280), granted outright to certain states civil and criminal jurisdiction[6] over

[4] [Continued]
by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe." Sec. 4, 25 Stat. at 677.

[5] The language of the Montana Constitution, Ordinance I, sec. 2 (1889), Vol. 1, Revised Code of Montana (R.C.M.) 1947 at 328, is substantively identical to the pertinent language of the Enabling Act. Montana adopted and ratified in 1972 a new Constitution which became effective on July 1, 1973. Vol. 1, R.C.M. 1947 (Supp. 1974 at 43). Article I of the new Constitution provides:

> "All provisions of the enabling act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the state of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States, continue in full force and effect until revoked by the consent of the United States and the people of Montana." Vol. 1, R.C.M. 1947 (Supp. 1974 at 44).

[6] 28 U.S.C. § 1360 and 18 U.S.C. § 1162, amended by the Act of April 11, 1968, 82 Stat. 73, 78-79, 25 U.S.C. §§ 1321-22. Public Law 280 neither granted nor tendered absolute jurisdiction. See 28 U.S.C. § 1360(b) and (c).

Indians residing in Indian Country[7] and tendered such jurisdiction to other states, including Montana. Montana, in 1963, enacted a law[8] under which it would accept complete or partial jurisdiction in either civil and/or criminal matters over the Tribes' members and Reservation, but only after receipt of a resolution from the Tribal Council, the recognized governing body, "expressing its desire that its people and lands be subject" to such jurisdiction. The Tribal Council adopted Ordinance 40-A (Revised) (attached as Appendix A to this brief) on May 7, 1965, purporting to accept, subject to several general conditions and limitations, the extension of state jurisdiction over Indians within the Reservation

> "to the extent such laws and jurisdiction relate to the subjects following:
>
> "(a) Compulsory School Attendance
>
> (b) Public Welfare
>
> (c) Domestic Relations (except adoptions)
>
> (d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted
>
> (e) Juvenile Delinquency and Youth Rehabilitation
>
> (f) Adoption Proceedings (with consent of the Tribal Court)
>
> (g) Abandoned, Dependent, Neglected, Orphaned or Abused Children
>
> (h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways

[7] Congress has defined "Indian Country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation. . . ." 18 U.S.C. § 1151. See *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

[8] §§ 83-801 to 83-806, R.C.M. 1947.

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation."

As can be seen from the Ordinance, state jurisdiction to tax Indians within the Reservation clearly was not agreed to by the Tribes.[9]

The Governor, on October 8, 1965, issued a Proclamation (Appendix B to this brief), reciting the Tribal Ordinance, the Montana statute, and the consent of the four counties which lie partially within the Reservation to the assumption of partial state jurisdiction;[10] and authorizing the extension of state civil and criminal jurisdiction over the Reservation as "expressed in their approved Ordinance 40-A (Revised)."[11]

Appellees and cross-appellants do not dispute the accuracy of appellants' (hereafter "state" or "state parties") description of the modern Flathead Reservation (App. Brf. 4-7) as far as it goes, which is essentially a partial reprint of facts from the majority and dissenting opinions below (392 F. Supp. at 1312-13, 1318; App. 12-14, 23-24). But the Tribes do call this Court's attention to the remainder of the facts found by the lower court majority. In essence, they show that the Tribes provide law and order and a court system for tribal members, as well as providing community services, including health

[9] The Ordinance provides that if it be held to extend a jurisdiction more extensive than set forth in the Ordinance, then the entire Ordinance "shall be held void and of no effect from the beginning." (Appendix A to this brief, p. A-3).

[10] The counties of Flathead, Lake, Missoula and Sanders.

[11] Neither the State of Montana nor its supporting parties have contended in these suits that the extension of state jurisdiction pursuant to Public Law 280 included the right to tax Indians on the Reservation. The history of that extension, however, serves as background for these cases.

care, special assistance (burials, fires, welfare), employment assistance, housing, tribal projects (support of Indian community events) and the administration of programs unique to tribal government. These facts also show that the federal government in fiscal year 1974 expended $6,436,614.53 in its supervision of Indian affairs on the Reservation and that at least some of the federally funded programs benefitted both Indians and non-Indians. The federal programs included education, social services, housing improvement, employment assistance, adult vocational training, law and order, forestry, range management, soil and moisture conservation, road construction and maintenance, real property management, general trustee services and Indian business development. Complementing the federal effort was the expenditure of $5,398,792.86 in the same fiscal year by the Tribes from tribal funds, derived from tribal earnings through the sale and lease of tribal property and the operation of tribal enterprises (392 F. Supp. at 1314-15; App. 14-16).

C. The Cigarette Tax Case—*Moe*

Prior to April, 1972, former plaintiff Wheeler (now deceased), a member of the Tribes, leased from the Tribes, with approval of the Bureau of Indian Affairs, two tracts of land within the Reservation and held in trust by the United States. One is located in Missoula County; the other is located in Lake County. Wheeler established retail stores on both sites, where he sold, among other items, cigarettes. He did not possess a cigarette vendor's license issued by the State of Montana, § 84-5608.3, R.C.M. 1947 (App. 155 [218]), and he neither affixed the state cigarette tax stamps to cigarettes sold, as provided by § 84-5606, R.C.M. 1947 (App. 151-153 [214-16]), nor precollected the state cigarette sales tax, as provided by § 84-5606 and § 84-5606.10, R.C.M., 1947 (App. 151-153 [214-16], 157 [220]). The Tribes control the sale by tribal members of cigarettes on the

Reservation and charge an administrative fee therefor. The Tribes are authorized by their Constitution to tax cigarette sales within the Reservation, but they have not done so to date.[12]

On April 13, 1972, deputies from the Sheriff's Office, Missoula County, raided Wheeler's store located in that county and arrested him for selling unstamped cigarettes and for not possessing a vendor's license. They raided the store again on April 20, 1972, and seized 1,350 cartons of unstamped cigarettes. On both occasions the deputies tore down signs on the premises advertising the cigarette sales.

Also on April 13, 1972, deputies of the Sheriff's Office of Lake County raided Wheeler's store located in that county and arrested tribal party Clinkenbeard on identical charges.

Suit was initiated on April 25, 1972, in the United States District Court for the District of Montana, Missoula Division, by the Tribes, the Tribal Chairman, Wheeler and Clinkenbeard to enjoin enforcement of the state cigarette tax statutes, and any regulations promulgated thereunder, with respect to tribal members who sold cigarettes within the Reservation. Plaintiffs below maintained that enforcement of the state laws was (1) a violation of the United States Constitution, Art. I, sec. 8, cl. 3, whereby Congress is given the exclusive power to regulate commerce with Indian tribes; (2) an abridgement of the Treaty of Hell Gate; and (3) inconsistent with the limited jurisdiction which Montana asserts over the Tribes by virtue of Public Law 280, 67 Stat. 588. On the basis of the constitutional claim, a three-judge court was convened pursuant to 28 U.S.C. § 2284, and it presided throughout the course of proceedings below.

[12] The facts in this and the following paragraphs are recited in 392 F. Supp. at 1301 and 1313; App. 14, 40.

The district court entered four opinions in this case. The first, an unreported, unanimous *per curiam* Memorandum Opinion dated October 10, 1973 (App. 73-86), held the state statutes requiring a cigarette vendor's license inapplicable to tribal members residing on the Reservation. The court also held that tribal members residing on the Reservation were not subject to the state cigarette sales tax. The court directed that supplemental briefs be filed on whether the state laws requiring precollection by the vendor of the state cigarette sales tax applied to tribal members selling to non-Indians.

The court issued a second Order and Opinion dated May 9, 1974 (392 F. Supp. at 1300-12; App. 37-71), reaffirming its earlier holding, but also deciding that the laws of the state requiring precollection for the state of the cigarette sales tax did apply to Indians selling to non-Indians. However, one judge now dissented with respect to the holding that immunized the tribual parties from state law. (App. 62-71).[13] The defendants below moved for a rehearing, based on the dissenting opinion, and the case was reopened for further discovery and hearing.

The court issued a third Supplemental Order and Opinion, dated February 3, 1975 (392 F. Supp. at 1312-24; App. 11-35), in which it summarized the essence of the discovery (392 F. Supp. at 1312-15; App. 12-16), reached conclusions about the importance of federal and tribal contributions to the "economic well being of the Reservation," including services beneficial to non-Indians and "many programs unique to tribal government" (392 F. Supp. at 1314-15; App. 16), and reaffirmed its opin-

[13] The dissent of Judge Smith is not printed in the official report. It should commence at 392 F. Supp. 1312, prior to the Supplemental Order and Opinion starting on that page. The failure to print the dissent gives the erroneous impression that the second *per curiam* opinion was unanimous.

ion of May 9, 1974. Judge Smith again dissented (392 F. Supp. at 1317-24; App. 22-35).

The court's final expression came in an unreported Memorandum (Cross-App. 1a-2a) issued simultaneonsly with its unreported Judgment of March 19, 1975 (App. 89-91). In that Memorandum, the court recognized that its ruling that Indians on the Reservation selling to non-Indians had to precollect the state tax "will result in complicated problems of enforcement by the State of Montana" (Cross-App. 1a). The court continued:

> "We think it preferable to await a final ruling of the Supreme Court on the validity of the cigarette excise tax imposed by the State of Montana with respect to sale to both Indians and non-Indians before attempting to resolve the enforcement problems. Obviously, the solution will depend upon the Court's holding on the validity of the tax." *Id.*

D. The Income Tax Case

Subsequent to initiation of the *Moe* case, the Tribes and representative tribal members on May 17, 1972, sued to enjoin permanently the State of Montana and certain taxing officials from collecting state income tax on income earned by tribal members on the Reservation.[14] The suit was based on the same legal grounds as *Moe*. The same three-judge court was convened, but that case was settled by stipulation of the parties filed on July 30, 1973, to the effect that *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), controlled and the state had no jurisdiction to tax the income of members of the Tribes residing on the Reservation if the members earned their income from sources within the Reservation. (The stipulation is attached as Appendix C to this Brief.)

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[14] *Confederated Salish and Kootenai Tribes* v. *The State of Montana*, Civil No. 2157 (D. Mont., filed May 17, 1972).

E. The Personal Property Tax Case—*Montana*

Attorneys for the Tribes on January 25, 1974, wrote to Montana Attorney General Woodahl, asking him to order the cessation of collection by state and local officials of the tax on personal property of tribal members permanently residing on the Flathead Reservation. The attorneys cited as authority for their position the decision in *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, the first, unreported, unanimous Memorandum Opinion in *Moe* (App. 73-86), and the stipulation filed in the income tax case. The state never formally responded, but the tribal attorneys were advised informally that the Tribes' position was rejected by the state.

Thereafter, the Tribes and certain members residing on the Reservation initiated on March 28, 1974, the personal property tax case, *Montana*, seeking judgment (1) to declare unconstitutional the enforcement against them of state statutes[15] relating to the taxation of personal property; (2) to enjoin permanently the enforcement of those statutes and related regulations; and (3) to obtain refund of such taxes paid to the date of the court's final judgment. Defendants were the State of Montana, its Department of Revenue, and certain state and local officials involved with administration and collection of the tax. As in *Moe*, a three-judge court, consisting of the same judges, was convened pursuant to 28 U.S.C. § 2284. Plaintiffs moved for summary judgment, certain defendants answered, and other defendants moved

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[15] Those statutes, the enforcement of which the plaintiffs below sought to enjoin and which the district court in its judgment (App. 95) did enjoin, were

> " the provisions of Title 53, *Rev. Mont. Code*, §§ 114, 1025-1029, and Title 84, *Rev. Mont. Code*, §§ 201, 301, 302, 404, 406, 409, 410, 4201 and 4202 and related statutes for the assessment and collection of personal property taxes generally, and in particular of personal property taxes on motor vehicles. . . ."

to dismiss the complaint. Following reopening of the *Moe* case for development of facts relating to the Flathead Reservation, *Montana* in effect was consolidated with *Moe* for purposes of discovery. Upon completion of that discovery, all parties agreed there were no genuine issues of material fact in *Montana* and, accordingly, moved for summary judgment.

On March 19, 1975, the district court entered its Order and Opinion in *Montana* and granted, on the authority of its decisions in *Moe*, summary judgment to the plaintiffs. The consequences of the court's holding were pretermitted by the court, in accordance with its Memorandum in *Moe* (Cross-App. 1a-2a), "pending a final determination [by the Supreme Court] of the constitutionality of the statutes in question with respect to their enforcement against plaintiffs" (392 F. Supp. at 1328; App. 9).[16] The dissenting judge in *Moe* again dissented, in part, with respect to the holdings as to the statutes' unconstitutionality[17] and as to the inapplicabilty of personal property tax laws on tribal members who were allotted and received fee patents (392 F. Supp. at 1328-29; App. 9-10).

SUMMARY OF ARGUMENT

I. *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), held that the State of Arizona lacked

[16] While not clear, it appears the court was erroneously referring to the "consequences" involved in its holding in *Moe* that, while the state lacked jurisdiction over tribal members on the Reservation, those members selling cigarettes to non-members had to act as agents of the state and precollect the state cigarette tax.

[17] The state collects its personal property tax levied against vehicles, § 84-406, R.C.M. 1947 (App. 144), by conditioning the issuance of the annual vehicle registration (license tag) on payment of that tax, § 53-114(2) and (3) (App. 135-36). In addition to payment of the assessed personal property tax, the vehicle owner must pay various license fees. The tribal parties did not contest the need to pay the various registration fees, only the need to pay the assessed personal property tax.

the jurisdiction to tax the income of an Indian earned while residing on the Navajo Reservation. *McClanahan* and its precedent support the ruling below that the State of Montana lacks the jurisdiction to tax the personal property of Indians residing on the Flathead Reservation, to tax cigarette sales (purchases) by those Indians and to require those Indians to possess state licenses if they desire to sell cigarettes on the Reservation. Identically, *McClanahan* and its precedent compel reversal of the decision of the court below that the state has the jurisdiction to compel the Indians involved to precollect the cigarette tax on Reservation sales to non-Indians.

The General Allotment Act of February 8, 1887, § 6, 24 Stat. 388, 390, as amended, 25 U.S.C. § 349, does not support the state's argument that Congress granted Montana jurisdiction to enforce its tax laws on Indians who received allotments on the Flathead Reservation and now own those allotments in fee, rather than in trust, because Congress exercised its plenary power over Indians after 1887 to establish exclusive federal jurisdiction. Subsequently, Congress tendered jurisdiction to Montana, but it declined to accept it.

The assertion by the state that the immunity from state taxation inherent in the decisions below is invidious discrimination based on race and therefore unconstitutional is without merit. The tax immunity flows from the United States Constitution, Art. I, sec. 8, Cl. 3, whereby the United States Congress is invested with plenary power over Indian affairs, and the relevant treaty and federal statutes. *Morton* v. *Mancari*, 417 U.S. 535 (1974); *United States* v. *Mazurie*, 419 U.S. 544 (1975). There is no racial discrimination, but rather a lack of jurisdiction in the state to impose its tax laws.

II. These suits are not barred by 28 U.S.C. § 1341. Indian tribes have a unique position under American law. They are quasi-sovereign in some respects. They

cannot be sued without the consent of the United States. *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940), and they may exercise certain constitutional powers delegated to them by Congress. *United States* v. *Mazurie*, *supra*, at 556-59. They also may sue in the federal courts pursuant to a jurisdictional grant that is analogous to that possessed by the United States, 28 U.S.C. § 1362. These two legal characteristics reflect the special position occupied by tribes and the special concern of the United States towards them, their property and their rights. In matters of federal jurisdiction, Indian tribes are closely analogous to the United States. The United States could have maintained the suits below. *United States* v. *Arlington County*, 326 F.2d 929 (4th Cir. 1964). Therefore the Tribes could. *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). And the court below was not barred by 28 U.S.C. § 1341 from enjoining the Montana statutes involved.

ARGUMENT

I. *McCLANAHAN* v. *ARIZONA STATE TAX COMM'N* AND ITS SUPPORTING PRECEDENT CONTROL THE MERITS OF THESE CONSOLIDATED APPEALS, THUS IMMUNIZING THE TRIBAL PARTIES FROM ALL STATE TAXATION JURISDICTION HERE INVOLVED

McClanahan v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), clearly compels the declaration and the injunction that Montana may neither tax nor license members of the Tribes who are residents of the Reservation with respect to cigarette sales on the Reservation, nor require any of them as cigarette vendors to precollect the state cigarette sales tax in transactions with non-Indians, nor impose on tribal members personal property

taxes. *McClanahan*, as the latest pronouncement of this Court on the question of Indian immunity from state taxation, offers a thorough review and restatement of the leading cases on that question and delineates the standards, which this case meets, necessary to immunize the tribal members from all state requirements involved here. In holding that the State of Arizona could not tax the income of an Indian from her employment on the Navajo Reservation, this Court read the "applicable treaties and federal statutes" pertinent to the Navajo Tribe against the "backdrop" of the doctrine of Indian sovereignty. (*Id.* at 172.) While recognizing certain qualifications to that doctrine as defined in *Worcester* v. *Georgia*, 31 U.S. 515, 557 (1832), the Court found that the aspect of that doctrine that precludes state jurisdiction continues today unless expressly revoked by Congress.

That express Congressional revocation is lacking in the instant case.

A. The District Court Correctly Held that the State Lacked Jurisdiction to Impose Its Personal Property Taxes on Tribal Members Residing on the Reservation and that It Could Not Impose Its Cigarette Sales and Licensing Tax Laws on Those Members

A comparison of the treaties and statutes relating to the Navajo Tribe analyzed in *McClanahan* with those relating to the tribal parties here demonstrates the correctness of the district court's holdings that the state lacks the jurisdiction to impose its personal property tax laws on tribal members residing on the Reservation and to impose its cigarette sales tax and licensing requirements on those members.[18]

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[18] The tribal parties contend there is no distinction in matters of state jurisdiction between tribal members residing on the Flathead Reservation and enrolled members of other tribes residing on the

[Footnote continued on page 18]

The treaties of the Navajo Tribe and of the Confederated Salish and Kootenai Tribes closely parallel each other in all relevant aspects. Article II of the Navajo Treaty of June 1, 1868, 15 Stat. 667, 668, described a reservation "set apart for the use and occupation of the Navajo tribe of Indians" and provided that

> "no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article."

The Flathead Reservation, by Article II of the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, 976 (App. 118-119), likewise was "set apart . . . for the exclusive use and benefit of said confederated tribes," and provided:

> "Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent."

Neither treaty specifically immunizes the tribal group from state taxation, but, as recognized in *McClanahan*, the general rule of interpreting Indians' treaties in favor of the tribes, *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930), which justifies immunizing the Navajo from Arizona taxation, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 175-76, also justifies immunizing the tribal parties here from Montana taxation.

[18] [Continued]
Flathead Reservation. See, *e.g.*, *Morton* v. *Ruiz*, 415 U.S. 199, 236 (1974); *United States* v. *Burland*, 441 F.2d 1199 (9th Cir. 1971), *cert. den.* 404 U.S. 842 (1971). The only individuals before the courts here, however, are tribal members, and the court below limited its decision to tribal members, except to hold invalid the cigarette tax "involved with respect to the sale of cigarettes by a member of Plaintiff Tribe on the Flathead Reservation to any Indian on the Reservation" (392 F. Supp. 1317; App. 21).

This Court in *McClanahan* also found significant the Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 568, 569-70, with its disclaimer of state authority over Indian lands. 411 U.S. at 175. Nearly identical language appears in section 4 of the Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677,[19] which required that state's constitution to

> "forever disclaim all right and title to . . . all lands lying within [the state] owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . ."

The state made this disclaimer in the original Montana Constitution, Ordinance I, sec. 2 (1889), Vol. 1, R.C.M. 1947 at 328. See also the disclaimer in section 2 of the Montana Territorial Act of May 26, 1864, 13 Stat. 85, 86.[20]

The Arizona Enabling Act states that it does not preclude Arizona from taxing any Indian-owned land "outside of an Indian reservation." 36 Stat. at 570. This Court recalled in *McClanahan*, *supra*, at 176, that it had construed "far more ambiguous" language than that as providing an Indian tax exemption, citing *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956). Section 4 of the Montana Enabling Act, 25 Stat. at 677, effects the same result with a slightly different approach by providing that

[19] The Enabling Act was for the States of North Dakota, South Dakota, Montana and Washington.

[20] Quoted at note 3, *supra*.

> "nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, *and* has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances [including such ordinance in the Montana Constitution] shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe." (emphasis added.)[21]

There is no more reason here than in *McClanahan* to give such language "an especially crabbed or restrictive meaning," 411 U.S. at 176, in determining the state lacks jurisdiction to impose its tax laws.

Equally, the *McClanahan* interpretation of the Buck Act, 4 U.S.C. §§ 105 *et seq.* (1947) as Congressional protection of preexisting Indian tax immunity, 411 U.S. at 176-77, is as applicable in the instant case as it was there.

In another parallel with *McClanahan*, Montana admits that it has not assumed jurisdiction over the tribal parties for taxation purposes pursuant to the Act of August 15, 1953, 67 Stat. 588 (Public Law 280). For purposes of state taxation, the Indians within the Flathead Reservation stand in jurisdictional identity with the Indians of the Navajo Reservation, where Arizona has assumed no taxation authority pursuant to Public Law 280.

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[21] The restriction on state jurisdiction in the Montana Enabling Act is greater than that in the Arizona Act, for the latter does not require a severing of tribal relations *and* obtaining a fee patent before land held in fee by an Indian may be taxed. While an Indian may hold land in fee, the United States does not hold "Indian" land in trust for a non-Indian.

The Supreme Court of Montana, prior to the decisions below, also recognized at least twice, albeit reluctantly, that state jurisdiction over Flathead Reservation Indians, if any, was strictly limited. *State* v. *McClure*, 127 Mont. 534, 268 P.2d 629 (1954); *Security State Bank* v. *Pierre*, 162 Mont. 298, 511 P.2d 325 (1973). *Pierre* is particularly appropriate here in that it denies state court jurisdiction over a suit by a bank on a debt against a member of the Tribes for a transaction occurring on the Reservation.[22]

Finally, a comparison of the extent of state involvement at Navajo and Flathead again cuts off argument that the principles of *McClanahan* do not apply to this case.[23] The district court in the instant case held twice that while Montana expends state monies for the benefit of Indians on the Flathead Reservation, as Arizona does on the Navajo Reservation, the federal government also makes substantial expenditures in both places (392 F. Supp. at 1307 and 1314; App. 51-52 and 15-16). Furthermore, the court found that the Tribes expended almost $5.5 million in fiscal 1974 alone, nearly equal to the $6,436,614.53 the United States spent that fiscal year to benefit Indians and, to some extent, non-Indians on the Reservation (392 F. Supp. at 1314; App. 15-16).

Under these circumstances, the district court was clearly correct in its decisions that *McClanahan* compels

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[22] As this Court observed in *McClanahan*, the inability of Arizona to enforce in its courts the tax laws it sought to impose on tribal members "would seem to dispose of the case." 411 U.S. at 178-79.

[23] The tribal parties do not believe the factual matters emphasized and relied on in part by Judge Smith to support his dissent below (392 F. Supp. at 1318-19; App. 23-25) are relevant to disposition of this case. State jurisdiction over Indians residing on reservations is either granted by the United States (see 25 U.S.C. §§ 1321-22, amending 18 U.S.C. § 1162 and 28 U.S.C. § 1360), or it is not. Jurisdiction over Indians is not, as Judge Smith would have it, a matter of accretion or reliction.

the holding that Montana lacks the jurisdiction to tax the personal property of tribal members residing on the Flathead Reservation, that it cannot tax cigarette sales to those Indians, nor may it require tribal members selling cigarettes on the Reservation to obtain cigarette dealer licenses.[24]

B. The District Court Erred in Holding that Tribal Members Who Sell Cigarettes Must Precollect the Tax on Sales to Non-Indians

The tribal parties' sole disagreement with the district court in either *Moe* or *Montana* is its holding in *Moe* that tribal members selling cigarettes on the Reservation to non-Indians must precollect the tax on those sales.[25]

Williams v. *Lee*, 358 U.S. 217 (1959), established the rule that when state involvement within a reservation reaches the point of interfering with tribal self-government, that involvement becomes impermissible. 358 U.S. at 220. The district court recognized this principle, but reversed its application and reached its erroneous results. The court's reversal of the principle is found in its conclusion:

> "that under these facts the Indian seller in selling cigarettes to non-Indians is involved with non-Indians to a degree which would permit the State of Montana to require precollection of the tax imposed upon the non-Indians." (392 F. Supp. at 1311; App. 59)

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[24] 392 F. Supp. at 1307 and 1317; App. 52 and 60.

[25] The Supreme Court of Idaho has ruled the state may not force reservation Indians to precollect such taxes, *Mahoney* v. *State of Idaho Tax Commission*, 96 Idaho 59, 524 P.2d 187 (1974), *cert. denied*, 419 U.S. 1089 (1974). The Supreme Court of Washington reached a contrary conclusion. *Tonasket* v. *State of Washington*, 84 Wash.2d 164, 525 P.2d 744 (1974), appeal dismissed for want of substantial federal question, 420 U.S. 915 (1975).

It is not Indian involvement with a non-Indian that permits state jurisdiction, but the very non-Indian (state) involvement that precludes jurisdiction. *Williams* v. *Lee*, *supra*, at 220-23; *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 686-87 (1965).

The Montana statutory scheme contemplates the purchase of cigarettes for resale and the affixing of the state tax stamp thereto only by licensed wholesalers and licensed retailers. §§ 84-5606.11 and 84-5606.12 R.C.M. 1947, *supra* (App. 157 [220]). The value of the tax stamp is to be added to the cost of the cigarettes by the retailer (or wholesaler) and recovered from the ultimate consumer, § 84-5606.10 R.C.M. 1947, *supra* (App. 157 [220]). Thus, under the court's decision, any tribal member who retails cigarettes to non-Indians is required to prepay the tax in the first instance to his wholesaler when he purchases the cigarettes for his store.

In simple terms, therefore, he has been taxed, and he has suffered a measurable out-of-pocket loss, because he has been forced to pay money to the state, and he has been forced to do this as a precondition to operating an independent business under tribal regulation. This is a gross interference with freedom from state regulation, even assuming the tribal member can recoup all of the money he had to advance (interest-free) for state purposes.[26] He has been made an involuntary agent of the state to precollect taxes owed by non-Indians.

In addition, the court's ruling collides directly with tribal self-government, for the Tribes now regulate the sale of cigarettes by tribal members and if the Tribes ever seek to exercise their tribal constitutional authority to impose a tribal cigarette sales tax on the merchandise, they would be seriously disadvantaged, for their tribal

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[26] He may never recover the tax paid for any number of reasons, ranging from theft to spoilage of his stock. He, of course, can never recover the interest-free loan made to the state.

retailers would be forced to collect not only the tribal tax but the state tax as well. Recognition of this fact is a deterrent to the Tribes' imposing their own tax, which would preclude raising much-needed revenue.

The involuntary monetary burden placed on the Indian retailer and the *de facto* disadvantage the Tribes face in exercising their full constitutional authority, make it clear that the decision below sanctions an infringement of tribal self-government which is not permitted. *Williams* v. *Lee*, *supra*.

The lower court's decision also is at odds with *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, *supra*. There, a non-Indian who traded with Indians on the Navajo Reservation was held to be exempt from the Arizona gross proceeds tax, basically because of federal preemption in the field of Indian commerce. Here, the Indian commerce involves Indians selling to non-Indians. Surely, if a non-Indian is exempt from state tax laws because of Indian commerce, then an Indian also is exempt.

Finally, the lower court left unanswered this Court's proposition in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 178-79, that Arizona had no jurisdiction to enforce its tax:

> "Arizona, of course, has neither amended its constitution to permit taxation of the Navajos nor secured the consent of the Indians affected. Indeed, a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. § 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians. See Brief for Appellee 24-26.[19] But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected. Cf. Tr. of Oral Arg. 38-39. Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, cf. *Ward* v. *Board of County Comm'rs*, 253 U.S. 17 (1920), the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case."
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[19] In light of our prior cases, appellee has no choice but to make this concession. See, *e.g.*, *Kennerly* v. *District Court*, 400 U.S. 423 (1971); *States* [sic] v. *Kagama*, 118 U.S. 375 (1886)."

It is precisely so here, for the state has not assumed general jurisdiction over tribal members on the Reservation, and there is no way the state can enforce against tribal members the tax laws in question. Jurisdiction is the power to compel, and the state lacks that power here.[27]

C. The State's Lack of Authority to Tax Indians on the Flathead Reservation is Jurisdictional, Based on the Constitution, Treaties and Applicable Federal Statutes, and Does Not Involve Racial Discrimination

The state contended in the later stages of *Moe* that the immunization of tribal members from state taxation because of a lack of jurisdiction is an unconstitutional racial discrimination against non-Indians. The district court quite correctly rejected the contention, which misconstrues the nature of the Indian immunity from state taxation. The lower court recognized that:

[27] The state does have jurisdiction over the non-Indian purchaser and can compel him to purchase only stamped cigarettes (see §§ 84-5606.18 and 84-5606.31 R.C.M. 1947 (App. 159 [222] and 164 [227]). The court below considered the burden imposed on the state in enforcing its laws against non-Indian violators too great and therefore imposed the burden on the Indians: "We agree with defendants that this remedy would be costly and ineffective. . . ." (392 F. Supp. at 1311; App. 59). The question of jurisdiction, however, is not one based on ease, convenience or a balancing of equities.

> "The exemption of Indians from the state cigarette and other taxes is not based on race. Rather, relevant treaties and federal statutes serve as the basis for the distinction between Reservation Indians and all others in the imposition of state taxes. The entire history of Indian law attests to that fact." (392 F. Supp. at 1315; App. 18)

Morton v. *Mancari*, 417 U.S. 535 (1974), dealt precisely with such a challenge, and similarly rejected it. This Court noted that the power to treat with Indian tribes is grounded in the United States Constitution, Art. I, sec. 8, cl. 3, and therefore Congressional use of that power in dealing with the special problems of Indian affairs was constitutional, 417 U.S. at 551-52, and that

> "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationship and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552.

This Court then reviewed many cases in which it had long accorded Indians special treatment, with particular reference to *McClanahan*, and concluded:

> "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555.

The tax immunity that flows here from the state's lack of jurisdiction must likewise remain undisturbed, until the state is granted jurisdiction by explicit Congressional action. Therefore, the state's quarrel is misdirected

in terms of subject matter and parties. It is not a question of discrimination; it is a question of jurisdiction. And, it is neither this Court nor the Tribes to whom its complaint should be directed. Rather, the state has a quarrel either with Congress, for now precluding the state from unilaterally assuming jurisdiction over the Reservation, or with itself, for not unilaterally assuming that jurisdiction when Congress accorded it the opportunity.

Congress has exercised its plenary power over Indian tribes to subject Indians on various reservations to complete [28] or partial state jurisdiction or to go farther and terminate completely federal supervision and federal rights over the property and affairs of reservation Indians.[29] Congress offered Montana the choice, regardless of the desires of the Indians, to assume unilaterally civil

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[28] 28 U.S.C. § 1360 (civil) and 18 U.S.C. § 1162 (criminal) imposed jurisdiction unilaterally on Indians on reservations located (with minor exceptions) within Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. The provisions allowed other states, such as Montana, to assume this jurisdiction.

[29] See, for example, Klamath Termination Act of August 13, 1954, 68 Stat. 718, 25 U.S.C. §§ 564 *et seq;* Menominee Termination Act of June 17, 1954, 68 Stat. 250, 25 U.S.C. §§ 891 *et seq.* See also *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), and *Kimball* v. *Callahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1975), post-termination decisions wherein the courts held the states were not granted jurisdiction by Congress over Indian hunting and fishing activities on former reservation lands. A terminated tribe no longer has federal supervision over its property and its members, no longer receives federal services provided other tribes and no longer has recognized tribal self-government. Congress reasserted federal supervision and control over the Menominee Tribe by the Menominee Restoration Act of December 22, 1973, 87 Stat. 770, 25 U.S.C. §§ 903 *et seq.*, repealing the Menominee Termination Act, *supra*, this note. Congress reasserted federal jurisdiction because of the disastrous effects termination had on the Menominee Indians. See generally S. REP. NO. 93-604 and H. R. REP. NO. 93-572, 93d Cong., 1st Sess. (1973). As stated in the Senate Report at page 3, termination of federal supervision "brought the Menominee people to the brink of economic, social and cultural disaster."

and criminal jurisdiction over the Indians on the Flathead Reservation. Section 7 of the Act of August 15, 1953, 67 Stat. 588, 590. Montana declined the offer.[30]

The state, aware of its jurisdictional deficiency, seeks to remedy its problem under the guise of racial discrimination, by asking this Court to exercise a power the state once held,[31] but declined to exercise, and grant the state

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[30] In January, 1954, in response to H.R. Con. Res. 108, 67 Stat. B132 (1953), S. 2750 and H.R. 7319, 83d Cong., 2d Sess., were introduced into Congress. The bills were identical. Each was

> "to provide for the termination of Federal supervision over the trust and restricted property of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana and the individual members thereof, for the disposition of federally owned property acquired or withdrawn for the administration of the affairs of such Indians, and for a termination of Federal services furnished such Indians because of their status as Indians." Sec. 1.

Hearings were held, but the bills were never reported out of Committee. See *Termination of Federal Supervision Over Certain Tribes of Indians, Joint Hearings on S. 2750 and H.R. 7319 Before the Subcommittee of the Committees of Interior and Insular Affairs*, 83d Cong., 2d Sess., pt. 7, Flathead Indians, Montana (1954).

Montana was aware of the increased costs it would have if it received jurisdiction by termination. The Governor of Montana informed Congress, in conjunction with the hearings on the bills:

> "H.R. 7319 and S. 2750 are commendable in ultimate aim of granting full citizenship rights and privileges to Indians. However, suggest adequate safeguards to protect elderly full-blood Indians. Also believe Federal Government should participate during transition period in financial impact on State and county government due to increase in welfare, public roads, education, employment, health, law enforcement, housing and other services. Indian treaty rights should be fully explored. . . ." *Id.* at 869-70.

[31] A state no longer may unilaterally assume jurisdiction over Indians on a reservation. Act of April 11, 1968, 82 Stat. 78, 25 U.S.C. §§ 1321-26. The Tribes now could consent to state jurisdiction pursuant to 25 U.S.C. §§ 1321-22, and the limited jurisdiction

[Footnote continued on page 29]

jurisdiction over tribal members.[32] The state's lack of jurisdiction, however, is not founded on "race" in the sense urged by the state. The constitutional provision granting plenary jurisdiction to the United States is of equal dignity to other constitutional provisions. Neither it nor acts of Congress emanating from the authority it grants fall in the face of challenges that other constitutional provisions are or may be at odds with the challenged authority. *Morton* v. *Mancari*, *supra*; *United States* v. *Mazurie*, 419 U.S. 544 (1975). See *Parker* v. *Levy*, 417 U.S. 733 (1974), and *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974).[33]

This Court's opinion in *United States* v. *Mazurie*, *supra*, implicitly rejected a claim of racial discrimination by virtue of application of Indian liquor laws to non-Indians residing on fee patented land within the Wind River Reservation, and explicitly upheld the constitutional authority for those laws.

D. The District Court Properly Rejected the Argument that the General Allotment Act Gave Montana Jurisdiction Over Indians Holding Fee Patents

The state presses an argument first advanced by Judge Smith, dissenting in *Moe*, that section 6 of the General Allotment Act of February 8, 1887, 24 Stat. 388, 390, as amended, 25 U.S.C. § 349, has subjected to the civil and

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[31] [Continued]
transferred to the state could be "retroceded" pursuant to 25 U.S.C. § 1323. *Village of Walthill* v. *Omaha Tribe*, 460 F.2d 1327 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973).

[32] The Tribes do not concede that assumption of state jurisdiction would have given the state the power to impose the taxes involved here. That issue is not before the Court. See *McClanahan* v. *Arizona State Tax Comm'n*, *supra*, at 178, n. 19.

[33] If the state is correct in its argument, not only would Title 25 of the United States Code be erased, *Morton* v. *Mancari*, *supra*, at 552, but vast sections of Titles 10 and 50 also would be erased. See *Parker* v. *Levy*, *supra*.

criminal laws of Montana all tribal members who have received fee patents pursuant to that Act. The majority opinion properly rejected the argument, noting that not a single case was cited in support of it (392 F. Supp. at 1316-17; App. 19-20). The state still does not cite a single authority recognizing a distinction between reservation Indians holding fee patents pursuant to that status as reservation Indians. They cite only section 6 of the General Allotment Act.

More importantly, the argument of the state fails to consider the constitutional basis of Congressional control over Indian affairs. The state, in effect, takes the position that once Congress has exercised its constitutional powers over Indian affairs by granting, immediately or in the future, jurisdiction to a state over Indians or their lands, the constitutional power is exhausted and the federal government can no longer legislate in that area. The proposition is startling. It makes the federal government's constitutional power over Indians a one-way ticket, good for one trip only. Constitutional power, however, is not so limited.[34]

Whether Congress changed the intent perceived by the state to be present in the General Allotment Act prior to the Indian Reorganization Act,[35] Act of June 18, 1934, 48

[34] If the state is correct, then Congress lacked authority to amend the Act of August 15, 1953, 67 Stat. 588, (Public Law 280), by the Act of April 11, 1968, 82 Stat. 73, 25 U.S.C. §§ 1321-26, or to enact the Menominee Restoration Act of 1973, 87 Stat. 770, 25 U.S.C. §§ 903 *et seq.* See note 29, *supra*. Equally, once liquor was allowed to be introduced within "Indian Country" pursuant to 18 U.S.C. § 1161, it could never be excluded again, regardless of the wishes of the United States or the tribe involved, except by state authority, in spite of 18 U.S.C. § 1154. This is not the case, however. See *United States* v. *Mazurie*, *supra*.

[35] Congress consistently demonstrated its intention to exercise continuing jurisdiction over Indian country by repeated re-enactments of the so-called Major Crimes Act, both before and after the

[Footnote continued on page 31]

Stat. 984, 25 U.S.C. §§ 461 *et seq.*, is not material to a decision here, however, for the latter Act explicitly established a firm policy of federal jurisdiction.

Section 1 of that Act, 25 U.S.C. § 461, terminated the allotment policy, and section 2, 25 U.S.C. § 462, provided:

> "The existing period of trust placed upon any Indian lands and any restriction or alienation thereof are hereby extended and continued until otherwise directed by Congress."

The district court, relying on *Mattz* v. *Arnett*, 412 U.S. 481 (1973), also correctly held that the policy of the General Allotment Act was "completely consistent with continued reservation status." 412 U.S. at 497, quoted in 392 F. Supp. at 1316 (App. 19-20).[36] The Indian Reorganization Act, of course, revoked whatever jurisdictional grant may have been intended by the General Allotment Act.

The state's position also would require a determination by this Court that Congress, in the exercise of its constitutional power over Indians, intended to create and perpetuate a confused jurisdictional skein wherein various members of a tribe would be subject to state jurisdiction because of receipt of allotments that went to fee, while other members, because they either were unallotted or retained their allotment, would not be. As this Court observed in *Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962):

> "For that argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or non-existence of

[35] [Continued]

General Allotment Act. See section 9 of the Act of March 3, 1885, 23 Stat. 362, 385; section 328 of the Act of March 4, 1909, 35 Stat. 1088, 1151; the Act of June 28, 1932, 47 Stat. 336; the Act of June 25, 1948, 62 Stat. 683, 757, 18 U.S.C. § 1151, as further amended by section 25 of the Act of May 24, 1949, 63 Stat. 89, 94.

[36] See also *Seymour* v. *Superintendent*, 368 U.S. 351 (1962).

federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal government. Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of [18 U.S.C.] § 1151 and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid." (footnote omitted).

The state would create here a similar nightmare on the basis of a federal intent or policy it perceives in an 1887 law, even though Congress explicitly has legislated to the contrary.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE CASES BELOW WERE NOT BARRED BY 28 U.S.C. § 1341 AND THAT FEDERAL JURISDICTION EXISTS WITH RESPECT TO THE TRIBES PURSUANT TO 28 U.S.C. § 1362 AND THE INDIVIDUAL TRIBAL MEMBERS PURSUANT TO 28 U.S.C. § 1343 AND 42 U.S.C. § 1983

The state attacks the jurisdiction of the federal courts here on the ground that the cases below fall within no widely recognized exception to 28 U.S.C. § 1341.[37] The district court, however, showed (392 F. Supp. 1301-05; App. 41-47) that an exception for these tribal parties to the bar of section 1341 fully conformed to cases where the bar has been lifted because the United States had a "special interest" in the parties affected by the challenged tax, *United States* v. *Arlington County*, 326 F.2d 929, 931 (4th Cir. 1964). This exception was recognized

[37] The state raises no matter on this question that was not already presented in its jurisdictional statement to the Court.

in a case brought by an Indian tribe in which the United States was not a party, *Agua Caliente Band of Mission Indians* v. *County of Riverside*, 442 F.2d 1184, 1185-86 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972). There, as here, the tribe had a right to sue to protect its property from being taxed, even without the United States as a party, because the tribe could have been a "co-plaintiff" with the United States. *Id.*

As the district court observed, the courts have recognized that the legislative history of section 1341 showed that Congress was intent on correcting

> "the disparity between the rights of a citizen of a state, whose only means of litigating his disputed tax liabilities was a [state court] suit for refund of prepaid taxes, and those of foreign corporations and nonresidents, doing business within the state and incurring tax obligations, who could [because of diversity jurisdiction] obtain in the federal courts equitable relief denied to citizens of the state." *United States v. Livingston*, 179 F. Supp. 9, 11 (E.D.S.C. 1959), *aff'd*, 364 U.S. 281 (1960).

This Court has recognized there is "an unbroken line of authority [including *Livingston*] and convincing evidence of legislative purpose," *Dept. of Employment* v. *United States*, 385 U.S. 355, 358 (1966), pointing to an exception of section 1341 where the United States and its instrumentalities are involved.

There is no reason to think that the "special interest" of the United States in these tribal parties is anything less than its interest in an unquestioned federal "instrumentality."

Recognizing that the status of the federal instrumentality doctrine, now open to question by *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 150-51 (1973), and *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 169-70 (392 F. Supp. at 1303, n. 9; App. 43, n. 9),

the lower court did not base its opinion on that doctrine, but rather on the legitimate and logical exception to section 1341 that the United States clearly does have a "real and significant interest" in the affairs of both the Tribes and their constituent members, by virtue of the Treaty of Hell Gate, *supra*, and the long line of cases dealing with federal trust responsibility to reservation Indians. See, *e.g.*, *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942). The federal government clearly could have brought *Moe* and *Montana* on behalf of the Tribes without bar by section 1341, for it has done so in similar situations where it has a "special interest", such as maintaining its policies and programs for members of the armed forces, *United States* v. *Arlington County*, *supra*, an interest that might be considerably less than its interest in and trust responsibility toward the Tribes. And the fact that the federal government did not bring the suit does not preclude the tribal parties from instituting the litigation. See, *e.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968).

In fact, Congress, in recognition of the unique status of Indian tribes [38] and their needs, granted to tribes by 28 U.S.C. § 1362 a jurisdiction not granted any other entity.[39] This jurisdictional grant is the counterpart of

[38] See, e.g., Section 10(e) of the Federal Power Act of June 10, 1920, 41 Stat. 1063, 1068-69, as amended, 16 U.S.C. § 803(e), which specifically treats Indian tribes like the United States by providing that

> "when licenses are issued involving the use of Government dams or other structures owned by the United States or tribal lands embraced within Indian reservations the Commission shall, subject to the approval of the Secretary of the Interior in the case of such dams or structures in reclamation projects and, in the case of such tribal lands, subject to the approval of the Indian tribe having jurisdiction of such lands as provided in section 476 of Title 25 [U.S.C.], fix a reasonable annual charge for the use thereof. . . ."

[39] ". . . The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the In-

[Footnote continued on page 35]

that aspect of tribal sovereignty which precludes suit against an Indian tribe without the consent of the United States. *United States* v. *United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512 (1940).[40]

The combination of this jurisdictional grant and tribal immunity make an Indian tribe closely analogous to the United States in matters of federal jurisdiction, thus permitting the district court to hear these cases.

[39] [Continued]

terior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362.

[40] Certainly, should section 1341 be held a bar to these suits, the United States, as trustee for the Tribes and their members, in light of the decisions below, would be compelled to file identical suits immediately, the court below compelled to rule as it did and the case presented again to this Court.

CONCLUSION

For the foregoing reasons, the portions of the judgments appealed from in No. 74-1656 should be affirmed and the portion of the judgment appealed from in No. 75-50 should be reversed, with directions to enter judgment declaring invalid and enjoining the enforcement of the requirement that tribal members must precollect the Montana state cigarette tax on sales within the Flathead Reservation by those members to non-Indians.

Dated this 22nd day of December, 1975.

Respectfully submitted,

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APPENDIX

APPENDICES

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA

Tribal Ordinance 40-A (Revised)

ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, AMENDING SECTIONS AND CHAPTERS OF THE "ORDINANCE OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, NO. 36-A (Revised) ADOPTED MAY 23, 1962", HEREINAFTER REFERRED AS THE "OFFICIAL CODE OF ORDINANCES", AS FOLLOWS:

Be it enacted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Dixon, Montana:

That Chapter 1, Section 2, Jurisdiction, of the Official Code of Ordinances be and the same is hereby amended to add subsections 1 and 2 of this ordinance following paragraph three to read as follows:

"Subsection 1: Subject to the conditions and limitations expressed in Subsection 2 hereof, the laws and jurisdiction of the State of Montana, including the judicial system of the State, are hereby extended pursuant to, and subject to the conditions in, the Act of the Montana Legislature of February 27, 1963, Laws of Montana, 1963, Vol. 1, Chap. 81, P. 170, to Indians within the Flathead Reservation to the extent such laws and jurisdiction relate to the subjects following:

(a) Compulsory School Atendance

(b) Public Welfare

(c) Domestic Relations (except adoptions)

(d) Mental Health, Insanity, Care of the Infirm, Aged and Afflicted

(e) Juvenile Delinquency and Youth Rehabilitation

(f) Adoption Proceedings (With consent of the Tribal Court)

(g) Abandoned, Dependent, Neglected, Orphaned or Abused Children

(h) Operation of Motor Vehicles upon the Public Streets, Alleys, Roads and Highways

(i) All Criminal Laws of the State of Montana; and all Criminal Ordinances of Cities and Towns within the Flathead Indian Reservation.

Subsection 2. The effectiveness of Subsection 1 hereof is conditioned upon the following:

(a) Concurrent jurisdiction remains (where applicable with Federal Courts) with the Tribal Court and in the Tribal Government of all matters referred to in Subsection 1; and any matter initiated in either a state or Federal Government Court or the Tribal Court shall be completed and disposed of in that Court, and shall not be subject to re-examination in the courts of the other jurisdiction.

(b) No person, once convicted of a crime falling within the jurisdiction of the State or Federal Government, or the Tribes pursuant to this ordinance, shall be punished for the identical act in the courts of the other jurisdiction, but shall be accorded the benefit of the doctrine of former jeopardy as if the separate jurisdictions were one.

(c) This ordinance is subject to possible referendum of the eligible voters of the Confederated Tribes pursuant to Article IX of the Constitution of the Confederated Tribes, and if a referendum is authorized and this ordinance disapproved by a majority under the conditions set forth in Article IX this ordinance

shall be void and of no effect to transfer any jurisdiction to the State of Montana and its judicial system.

(d) All jurisdiction of the Confederated Tribes under their Constitution and Bylaws, and ordinances enacted pursuant thereto, and of the Federal Government under the United States Criminal Code, to the extent not expressly transferred by Subsection 1 hereof, remains in the Confederated Tribes and in the Federal Government respectively to the same extent as if this ordinance had not been adopted.

(e) If any provision of the Act of the Montana legislature of February 27, 1963, Laws of Montana 1963, Vol. 1 Chap. 81, or of this ordinance shall be held invalid, or if this ordinance be held to extend a jurisdiction more extensive than set forth herein, or if any condition herein be not complied with or be held invalid or ineffective, then this entire ordinance shall be held to be void and of no effect from the beginning.

(f) In the event of any alleged violation of the Civil Rights of Tribal members by operation of this ordinance, the Tribal Council reserves the right to conduct an independent investigation of the alleged act; to seek redress in a court of competent jurisdiction; and to review the ordinance upon the validation of any such alleged offense.

Provided further that any sentences or convictions, lawfully inflicted under the provisions of this ordinance, shall not be affected by subsequent cancellation or voidance of this ordinance."

All ordinances and parts of ordinances in conflict herewith are hereby repealed (specifically Tribal Ordinance 40-A approved May 19, 1964).

A-4

CERTIFICATE

The foregoing ordinance was adopted by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana pursuant to the Act of the United States Congress of August 15, 1953; 67 Stat. 588, as amended (18 U.S. Code Section 1162; 28 U.S. Code Section 1360); the Act of the Legislature of Montana, February 27, 1963, Laws of Montana 1963, Vol. 1, Chap. 81, p. 170; and Article VI, Sec. 1, subsections (c), (n) and (q) of the Constitution of the Confederated Tribes, pursuant to Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, the 5th day of May, 1965, by a vote of 7 for, 0 against, and 0 not voting.

/s/ Walter W. McDonald
WALTER W. MCDONALD
Chairman, Tribal Council

ATTEST:

/s/ Alvin E. Sloan
ALVIN E. SLOAN
Secretary

/s/ P. T. LaBreche
P. T. LABRECHE
Superintendent
5/15/65

B-1

PROCLAMATION

WHEREAS, Chapter 81, Montana Session Laws of 1963, provides for the extension of criminal and civil jurisdiction of the State of Montana to the extent authorized by federal law and regulations upon The Confederated Salish and Kootenai Indian Tribes; and

WHEREAS, The act requires the Proclamation of the Governor of the State when the Tribal Council has created the proper authority and requested such Proclamation from the Governor of the State; and

WHEREAS, Such proper documents have been prepared entitled "Tribal Ordinance 40-A (Revised)" under date of May 5, 1965; and

WHEREAS, Approval has been secured from the Counties of Sanders, Lake, Flathead and Missoula; and

WHEREAS, It appears all things required in Chapter 81, Montana Session Laws of 1963, have been substantially completed;

NOW, THEREFORE, By the power vested in me, as Governor of the State of Montana, I, Tim Babcock, hereby proclaim that criminal and civil jurisdiction of the State of Montana and its subdivisions does extend to The Confederated Salish and Kootenai Tribes as expressed in their approved Ordinance No. 40-A (Revised), and Chapter 81, Montana Session Laws of 1963, and I further declare that sixty days from the date of October 8, 1965, such criminal and civil jurisdiction as previously described shall be in full force and effect.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Montana to be affixed. DONE at the City of Helena, the Capital, this 8th day of October, in the year of our Lord, One Thousand Nine Hundred and Sixty-five.

/s/ Tim Babcock
TIM BABCOCK
Governor

[SEAL]

ATTEST:

/s/ Frank Murray
FRANK MURRAY
Secretary of State

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FILED, July 30, 1973, John J. Parker, Clerk,

[Illegible], Deputy Clerk]

Civil No. 2157

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA ("TRIBES"), ET AL.,
Plaintiffs,

v.

THE STATE OF MONTANA, ET AL.,
Defendants.

STIPULATION

The parties to this action, through their counsel of record, hereby agree and stipulate to a final disposition of the above-captioned case as follows:

1. That the decision of the Supreme Court of the United States, on March 27, 1973, in *McClanahan* v. *Arizona State Tax Commission*, No. 71-834, controls the merits of this action by holding that the State does not have jurisdiction to tax an enrolled member of an Indian tribe on income earned from sources on his or her reservation.

2. That the individual plaintiffs in this action are enrolled members of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation, Montana, and are residents within the exterior boundaries of that Reservation and their income for purposes of this suit is derived from sources within the Reservation, specifically from employment with the Tribes.

3. That the plaintiffs' income earned from employment with the Tribes is clearly not subject to Montana individual income tax under the provisions of Title 84, Chapter 49, Revised Codes of Montana, 1947.

4. That defendants will voluntarily comply with the *McClanahan* decision by terminating all efforts to impose the Montana individual income tax upon the income of plaintiffs, and those similarly situated, who are enrolled members of the Confederated Salish and Kootenai Tribes and earned their income from sources within the exterior boundaries of the Flathead Indian Reservation. Defendants also will, with respect to the class of plaintiffs, withdraw all Warrants of Distraint, release all tax liens, and refund in accordance with Montana law all individual income taxes.

5. That this action will be voluntarily dismissed by the plaintiffs by agreement of the parties.

DATED this 17th day of July, 1973.

CONFEDERATED SALISH AND
KOOTENAI TRIBES, et al.

By: /s/ Richard A. Baenen
RICHARD A. BAENEN
Attorney for Plaintiffs

STATE OF MONTANA, et al.

By: /s/ Edward Jene Bell
EDWARD JENE BELL,
Chief Tax Counsel,
Department of Revenue
Attorney for
Defendants

IN THE

Supreme Court of the United States

October Term, 1975

Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

No. 74-1656

JOHN C. MOE, et al,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

THE STATE OF MONTANA, et al,

Appellants,

v.

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellees.

No. 75-50

THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al,

Appellants,

v.

JOHN C. MOE, et al,

Appellees.

On Appeal from the United States District Court For the District of Montana

---

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INDEX

Page

Table of Authorities ii

Argument

1. Constitutional due process and equal protection entitle the State of Montana to collect cigarette and personal property taxes from Indian citizen residents on the Flathead Reservation..... 3

2. The specific language of the General Allotment Act making Indian patentees subject to state law does not conflict with the Montana Enabling Act or the Indian Reorganization Act..... 4

3. The prohibition against federal jurisdiction in 28 U.S.C., Sec. 1341, bars suit to enjoin State action to collect taxes..... 5

4. Issues of this appeal unaffected by settled income tax case..... 5

Certificate of Mailing 7

TABLE OF AUTHORITIES

CASES: **Page**

Adams v. Maryland, 347 U.S. 179 (1954) 3

American Commuters Association, Inc. v. Levitt, 405 F.2d 1148 (2nd Cir. 1969) 5

Bland v. McHann, 463 F.2d 21 (5th Cir. 1972) 5

Civil Rights Cases, 109 U.S. 3 (1883) 3

Draper v. United States, 164 U.S. 240 (1896) 4

McClanahan v. State Tax Comm'n of Arizona, 411 U.S. 164 (1973) 3

Sage v. Baldwin, 55 F.2d 968 (N.D.Tex. 1932) 6

Schick v. United States, 195 U.S. 65 (1904) 3

Security State Bank v. Pierre, 162 Mont. 298, 511 P.2d 325 (1973) 4

Strauder v. West Virginia, 100 U.S. 303 (1879) 3

United States v. Butler, 297 U.S. 1 (1936) 6

CONSTITUTIONAL PROVISIONS: **Page**

Article 1, Sec. 8, Clause 3, United States Constitution 3

Fifth Amendment, United States Constitution 3

Fourteenth Amendment, United States Constitution 3

UNITED STATES STATUTES: **Page**

General Allotment Act, 24 Stat. 390, 25 U.S.C. § 349 4

Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 461, 462 4

Montana Enabling Act, 25 Stat. 676 4

28 U.S.C. § 1341 5

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On Appeal from the United States District Court For the District of Montana

---

ARGUMENT

1.

Constitutional due process and equal protection entitle the State of Montana to collect cigarette and personal property taxes from Indian citizen residents on the Flathead Reservation.

Appellees, relying primarily on *McClanahan v. State Tax Comm'n of Arizona,* 411 U.S. 164 (1973), argue that absent further affirmative Congressional action, the State of Montana may not assert jurisdiction to collect cigarette and personal property taxes. Additional Congressional action is not required. The obligation of individual Indian citizens to assume their fair share of tax obligations which finance state services provided to them and the right of the State of Montana to collect such taxes are rooted in constitutional due process and equal protection of the Fifth and Fourteenth Amendments. The protections afforded by these Amendments are self executing. *Civil Rights Cases,* 109 U.S. 3 (1883) and *Adams v. Maryland,* 347 U.S. 179 (1954). No further Congressional action is necessary or appropriate to implement their safeguards.

The general power of Congress to regulate commerce with the Indian tribes under Art. 1, Sec. 8, Cl. 3, and legislation enacted pursuant to that power must always be weighed against the fundamental principles embodied in the Fifth and Fourteenth Amendments. The general regulatory authority in Art. I, Sec. 8, Cl. 3, cannot be read to limit the free exercise of personal rights and obligations of all citizens of the State of Montana, including Indian citizens, guaranteed by the Fifth and Fourteenth Amendments. Any conflict between the general regulatory clause and the Amendments must be resolved in favor of the Amendments. *Schick v. United States,* 195 U.S. 65 (1904). See also *Strauder v. West Virginia,* 100 U.S. 303 (1879).

That treatment of Indian citizens differently from

non-Indians by the state results in a denial of due process and equal protection cannot be denied. This proposition was specifically acknowledged by the Montana Supreme Court in *Security State Bank v. Pierre,* 162 Mont. 298, 511 P.2d 325 (1973). That Court considered itself helpless, however, to "afford the equal protection of our law to both its Indian and nonIndian citizens on civil matters arising within the exterior boundaries of an Indian reservation" (162 Mont. at 305). This Court is under no such constraint.

2.

The specific language of the General Allotment Act making Indian patentees subject to state law does not conflict with the Montana Enabling Act or the Indian Reorganization Act.

Constitutional considerations aside, the language of the General Allotment Act, (24 Stat. 390, 25 U.S.C., § 349), is clear — Indian patentees, upon receipt of fee patents, became subject to the laws of the State of Montana. The significance of the Act lies in the fact that it had its effect directly upon individual Indians. By contrast, the portions of the Montana Enabling Act of February 22, 1889 (25 Stat. 676), and the Indian Reorganization Act of 1934 (48 Stat. 984, 25 U.S.C. §§ 461, 462) relied upon by the Tribes, both relate to the status of land titles and the control of such lands by the United States. Neither Act reaches the question of the right of the state to exercise jurisdiction over individual Indian citizens who had received fee patents under the General Allotment Act.

The interrelationship between the General Allotment Act and the Montana Enabling Act was discussed by this Court in *Draper v. United States,* 164 U.S. 240 (1896). There Mr. Justice White speaking for the Court noted:

> "From these enactments it clearly follows that at the time of the admission of Montana into the

> Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the power of the State to frustrate the limitations imposed by the laws of the United States upon the title of lands once in an Indian reservation, but which had become extinct by allotment in severalty, *and in which contingency the Indians themselves would have passed under the authority and control of the State.*" (Emphasis added.) (164 U.S. at 246.)

3.

The prohibition against federal jurisdiction in 28 U.S.C., Sec. 1341, bars suit to enjoin State action to collect taxes.

In these cases individual Indian citizens of the State of Montana seek to avoid and enjoin payment of state taxes. The absolute prohibition against such individual citizen suits voiced in *American Commuters Association, Inc. v. Levitt,* 405 F.2d 1148 (2nd Cir. 1969) and *Bland v. McHann,* 463 F.2d 21 (5th Cir. 1972), remains unanswered by the Tribes and their members.

4.

Issues of this appeal unaffected by settled income tax case.

The settled income tax case between the Tribes and certain of their members and the State of Montana is not a

part of the record in this appeal. The stipulation filed as a part of the settlement of that action (App. C, Brief for the Appellees) neither limits nor affects inquiry into the fundamental issues now before this Court. Determination of such issues, particularly constitutional issues, is solely for the courts. Cf. *United States v. Butler* 297 U.S. 1, (1936), and *Sage v. Baldwin* 55 F.2d 968 (N.D.Tex. 1932).

Respectfully submitted,

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CERTIFICATE OF MAILING

I, SAM E. HADDON, one of the attorneys for the Appellants, certify that on the 14th day of January, 1976, I served three copies of the foregoing REPLY BRIEF FOR THE APPELLANTS on each of the counsel for Appellants herein by mailing true copies thereof, first class postage prepaid as follows:

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Supreme Court, U. S.
FILED
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IN THE

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OCTOBER TERM, 1975
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

REPLY BRIEF FOR THE STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF POSITION OF THE STATE OF MONTANA

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INDEX

Page

I. *McCLANAHAN v. ARIZONA STATE TAX COMM'N* DOES NOT CONTROL THE MERITS OF THESE CONSOLIDATED APPEALS. THE MERITS ARE CONTROLLED BY THE PRINCIPLES ESTABLISHED IN *OKLAHOMA TAX COMMISSION v. U.S.* ..1

A. *McClanahan* is not controlling 2

B. *Oklahoma Tax Comm'n v. United States*, applied in the light of the principles of equal protection embodied in the Fifth Amendment, controls the merits of these appeals. 7

II. THE COURT NEED NOT REACH THE QUESTION OF WHETHER JURISDICTION EXISTS WITH RESPECT TO THE INDIVIDUAL TRIBAL MEMBERS PURSUANT TO 28 USC 1343(3) and 42 USC 1983 ...11

TABLE OF CASES

Board of County Comm'rs v. Seber, 318 U.S. 705 (1943)...10

Draper v. United States, 164 U.S. 240 (1896) 5

Goudy v. Meath, 203 U.S. 146 (1906) 5

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) ...12

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) 1, 2, 3, 6, 7, 9

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 10

Morton v. Mancari, 417 U.S. 535 (1974) 8, 10

New York v. United States, 326 U.S. 572 (1946) 10

Oklahoma Tax Comm'n v. United States, 319 U.S. 598 (1943) 1, 3, 6, 7, 9

Satiacum v. Kinnear, (CA 9th Cir.) No. 74-1121 13

Williams v. Lee, 358 U.S. 217 (1959) 6

FEDERAL CONSTITUTION, TREATIES AND STATUTES

	Page
Fifth Amendment—U.S. Constitution	7, 9, 11
Navajo Treaty of June 1, 1868, 15 Stat. 667, 668	3
Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, 976	3
Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 568, 569-70	4
General Allotment Act of February 8, 1887, 24 Stat. 388	5
Indian Reorganization Act of June 18, 1934, 48 Stat. 984	3
Montana Enabling Act of February 22, 1889, 25 Stat. 676, 677	4, 5
Act of May 8, 1906, 34 Stat. 182, 25 U.S.C. 349	5
Act of August 15, 1953, 67 Stat. 588 (Public Law 280)	6
28 U.S.C. 1341	11, 12
28 U.S.C. 1343(3)	11, 12
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Department of Commerce, Federal and State Indian Reservations and Indian Trust Areas, pp. 63-65 (G.P.O. 1974) 2

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975
No. 74-1656

JOHN C. MOE, et al.,

Appellants,

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al.,

Appellees,

OCTOBER TERM, 1975
No. 75-50

v.

CONFEDERATED SALISH & KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, et al.,

Appellants,

v.

JOHN C. MOE, et al.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

ARGUMENT IN REPLY TO APPELLEES (AND CROSS-APPELLANTS)

I

McCLANAHAN v. ARIZONA STATE TAX COMM'N DOES NOT CONTROL THE MERITS OF THESE CONSOLIDATED APPEALS. THE MERITS ARE CONTROLLED BY THE PRINCIPLES ESTABLISHED IN *OKLAHOMA TAX COMM'N v. U.S.*

A. *McClanahan is not controlling.*

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973) involved the applicability of a state tax law to a reservation Indian, as does the case at bar; but the similarity ends there. *McClanahan* involved a much different type of reservation and a much different type of tax.[1]

McClanahan reflected on the legal level the facts existing on the geographical level; not only is the Navajo reservation legally isolated, but it is isolated geographically as well. It encompasses about 14 million acres, of which at most only a minuscule portion is in private ownership.[2] As would be expected, the non-Indian population is likewise minuscule, if existent at all.[3]

At least one reason for this factual pattern is touched upon by Judge Smith in his dissent in the cigarette tax case, *Moe*:

> "Allotments in severalty were not made on the Navajo Reservation and the provisions of the General Allotment Act never applied to the Indians on that reservation." (App. 69.)

Judge Smith's characterization of the factual pattern is correct:

> "The Navajos live to themselves—largely apart from the non-Indian community." (App. 69.)

Not so with the Indian population on the Flat-

[1]This brief will be limited to a discussion of the type of tax in which the State of Washington has a direct interest, the cigarette tax.

[2]See Dept. of Commerce, *Federal and State Indian Reservations and Indian Trust Areas*, pp. 63-65 (G.P.O. 1974).

[3]*Ibid.*

head reservation, where Indians comprise only 19% of the total reservation population, and where approximately half of the land is owned in fee, by Indians and non-Indians, and the remaining half is held in trust for the Confederated Tribes (hereinafter "the Tribes") or its individual members. (App. 13.) The pattern on the Flathead reservation is one of geographic and economic integration, not isolation.

What was said of the Oklahoma Indians in *Oklahoma Tax Comm'n v. U.S.*, 319 U.S. 598 (1943), can also be said of the Indians on the Flathead reservation:

> ". . . [T]hey are actually citizens of the State with little to distinguish them from all other citizens except for their limited property restrictions and their tax exemptions [on such property]." (319 U.S. at 603.)[4]

In the light of these factual differences, we examine the legal parallels which the Tribes attempt to draw with *McClanahan*.

The language in Art. II of the Navajo Treaty of June 1, 1868, 15 Stat. 667, 668, is admittedly similar to that in Art. II of the Treaty of Hell Gate of July 16, 1855, 12 Stat. 975, 976, in that both treaties

[4]As noted in *Oklahoma Tax Comm'n v. United States* 319 U.S. at 603, note 5, the Oklahoma Indians have made progress toward restoring the tribal government under such laws as the Indian Reorganization Act, Act of June 18, 1934, 48 Stat. 984. Likewise, the Tribes have attained a measure of tribal government since 1934, now having their own court system and programs for law and order and other services. (See App. 15, 16.) The progress made by the Oklahoma Indians toward restoring tribal government did not grant them tax exemptions by implication, nor should it do so for the Tribes in the case at bar.

set a reservation apart for the use of the tribes involved and provide that generally no non-Indian may reside therein without permission of the tribes. (Br. of Conf. Tribes, 18.)

While the vitality of this language can hardly be in doubt with respect to the Navajo reservation, the same cannot be said with respect to the Flathead reservation, where less than a fifth of the population is still Indian. And if the Tribes can be said to be invoking that treaty language now, they invoke it only for the non-Indian tax collector, not for the non-Indian neighbors who patronize their members' smoke shops.

The Tribes also note the parallel language in the Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 568, 569-70 and in section 4 of the Montana (and Washington) Enabling Act of February 22, 1889, 25 Stat. 676, 677, which required the Montana constitution to

> "forever disclaim all right and title to . . . all lands lying within [the state] owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . . " (See Br. of Conf. Tribes, 19.)

Whatever may have been the purpose of the language in the Arizona Enabling Act, the purpose

of the language in the Montana Enabling Act is clear. It was intended to preserve federal control over lands allotted in severalty to the Indians in Montana under the General Allotment Act, Act of February 8, 1887, 24 Stat. 388, during the period in which the lands were still held in trust pursuant to section 5 of the Act but during which also the reservations would in effect have been dissolved and pursuant to section 6, ". . . the Indians themselves would have passed under the authority and control of the state." *Draper v. U.S.*, 164 U.S. 240 at 246. That this "authority and control of the state" referred to in *Draper* would include taxing jurisdiction is established by *Goudy v. Meath*, 203 U.S. 146 (1906). Thus, *Draper* conclusively shows that the disclaimer in the Montana Enabling Act contemplated a situation in which the Indians would be subject to state laws, including tax laws; the disclaimer was intended solely to preserve control of the land allotted under trust patent until the end of the trust period, even though during the trust period the Indian was subject to state laws.[5] See *Draper*, 164 U.S. 240 at 245, 246.[6]

Far from being an indication of congressional intent that Indians be immune from state laws, the

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[5]Section 6 of the General Allotment Act was later amended to become operative only at the *end* of the trust period. Act of May 8, 1906, 34 Stat. 182, 25 USC 349.

[6]*Draper* also explains why the disclaimer language in the Montana Enabling Act is cast in terms of Indian land, without any distinction between on-reservation and off-reservation land. Section 4 of the General Allotment Act set up a procedure for off-reservation Indians to obtain off-reservation public land, under procedures paralleling those for on-reservation Indians.

language of the Montana Enabling Act is just the opposite.

Montana has not assumed jurisdiction over the tribal parties for taxation purposes pursuant to the Act of August 15, 1953, 67 Stat. 588 (Public Law 280.) (Br. of Conf. Tribes, 20, 21.) But that hardly ends the discussion, as the Tribes suggest it should. Even the non-existence of PL 280 did not preclude state taxation in *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598 (1943). Nor was Arizona's failure to assume state jurisdiction over the Navajo reservation under PL 280 viewed in *Williams v. Lee*, 358 U.S. 217 (1959), as automatically cutting off any state jurisdiction. The test applied by the Court was whether tribal sovereignty was infringed, not whether PL 280 was implemented.

PL 280, we submit, was an invitation to expand whatever jurisdiction a state had prior to its enactment, and it provided a device for clearing up the many vexing questions as to what the scope of that jurisdiction was. It was not a trap which deprived the states of that already existing jurisdiction if the invitation to expand it was declined, as the Tribes seem to suggest. (Br. of Conf. Tribes, 20, 21.) *McClanahan* should not be read as setting up such a trap.

Finally, the type of tax involved in the case at bar is completely different from the personal income tax involved in *McClanahan*. The Montana cigarette tax imposes solely a collection obligation on the seller,

and arises only when the Indian seller becomes an entrepreneur, dealing with the same public as his non-Indian competitor. *McClanahan* established the right of the reservation Indian to earn his livelihood on the reservation—at least of the Navajo type—free from interference by the state tax collector. It did not establish his right to compete with the non-Indian in sales to the general public with the overwhelming tax advantage which the Tribes are asserting here. The right established by *McClanahan* for the Navajos is part of a larger right which they have always asserted and exercised, the right to be a people apart, left alone from the non-Indian population. The right asserted by the Tribes, especially with respect to sales to non-Indians, is the right to be left alone only up to a point, i.e., the point at which the tax collector comes calling.

B. *Oklahoma Tax Comm'n v. United States, applied in the light of the principles of equal protection embodied in the Fifth Amendment, controls the merits of these appeals.*

We start with several obvious but important considerations. For we believe that the Tribes slide too easily over the underlying problems. (Br. of Conf. Tribes, 25-29.)

Although the issue of the Indians' tax immunity can be phrased verbally as one of lack of jurisdiction, as suggested by the Tribes, at bottom the asserted immunity is based upon race and constitutes

a racial discrimination or preference. If the Congress were to pass a statute stating that no state would have "jurisdiction" to impose any taxes upon persons of Japanese ancestry, it would be ignoring realities to suggest that the immunity does not constitute a racial discrimination or preference. Even if the immunity were limited to certain types of persons of Japanese ancestry, such as those who could trace their ancestry to United States citizens relocated from the West Coast during World War II, the discrimination would still be racial. This is not to suggest that the discrimination would be unconstitutional; other considerations must be taken into account before that conclusion can be reached. Here we wish to point out only that the Tribes' attempt to cast the issue of racial discrimination in terms of jurisdiction is an attempt to hide the obvious.[7]

Admittedly, the immunity asserted by the Tribes can arise only in a certain geographical area, i.e., the Flathead reservation; and in this sense it smacks of "jurisdiction." But persons of other races cannot assert that immunity even though they be in that same geographical area. Thus a racial factor is a necessary ingredient in the asserted immunity, in addition to the geographical factor.

[7]While we have no difficulty with the result in *Morton v. Mancari*, 417 U.S. 535 (1974), we would suggest that the Court's characterization of the BIA hiring preference for members of federally recognized tribes as "political" rather than "racial" is misplaced. 417 U.S. at 553, note 24. The preference is both. The Court implicitly recognizes this when it refers to the "obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations." 417 U.S. at 554. This difficulty would hardly disappear if the blanket exemption covered only members of federally recognized tribes.

Secondly, neither in the case at bar, nor in *McClanahan*, nor in *Oklahoma Tax Comm'n* did the claimed tax immunity rest upon any language of a treaty or federal statute clearly and expressly granting the immunity. (The land held exempt from the state inheritance tax in *Oklahoma Tax Comm'n* may be viewed as an exception to this general statement. See 319 U.S. 598 at 610.)

Thirdly, the approach taken in *McClanahan* and that taken in *Oklahoma Tax Comm'n* are radically different. In the latter case, the Court focused on the assimilation of the Oklahoma Indians into non-Indian society, emphasized the principle that tax burdens and governmental benefits should go hand in hand, and accordingly required an express statutory exemption as a requirement for the asserted immunity.

In *McClanahan*, in contrast, the Court focused on the concept of tribal sovereignty, as applied on the Navajo reservation, and against this "backdrop" (411 U.S. at 172) found an immunity implied in various treaty and statutory provisions which, for the most part, did not deal expressly with taxation.

The choice between these two approaches is critical in resolving the issues in the case at bar. The principles of equal protection embodied in the Fifth Amendment require choosing the approach taken in *Oklahoma Tax Comm'n.*

There are several factors which can justify a

racial discrimination or preference in favor of Indians; but none of those factors are present here.

One is the factor present in *Morton v. Mancari*, 417 U.S. 535 (1974), i.e., a reasonable relationship between the Indian preference and the goal of Indian self-determination. But there is hardly any such relationship here; what is at stake here is simply the right of Indians to compete unfairly with their non-Indian competitors. Further, a tax on the commercial activities of even the sovereign itself, such as a state, is not an impairment of that sovereignty. See *New York v. United States*, 326 U.S. 572 (1946).

Another factor would be a federal policy of preserving Indian trust property intact, as exemplified by a statutory exemption of Indian land from property taxation. *Board of County Comm'rs v. v. Seber*, 318 U.S. 705 (1943). No such policy is present here.

Another factor would be a policy of freeing from state tax burdens the operation of a federally funded economic assistance program for Indians, such as that involved in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). There is no such policy or program here.

Morton v. Mancari, supra, establishes that the unique relationship between the federal government and the Indians can justify preferences which cannot be justified for any other racial group. But it also cautions us that the principles of equal protec-

tion embodied in the Fifth Amendment place limits on those preferences. The preferences must be reasonably related to "Congress' unique obligation toward the Indians." 417 U.S. at 555.

The tax immunities asserted here do not have that reasonable relationship. Accordingly, the Congress has never expressly granted them, and this Court should not create them by implication.

II

THE COURT NEED NOT REACH THE QUESTION OF WHETHER JURISDICTION EXISTS WITH RESPECT TO THE INDIVIDUAL TRIBAL MEMBERS PURSUANT TO 28 U.S.C. 1343(3) and 42 U.S.C. 1983.

The case at bar was commenced by both the Confederated Tribes and individual members thereof. The District Court predicated jurisdiction as to the Tribes upon 28 U.S.C. 1362 and jurisdiction as to the individual members upon 28 U.S.C. 1343(3) and 42 U.S.C. 1983 (App. 6). In so ruling, the District Court focused its attention only on the question of whether 28 U.S.C. 1341 defeated this jurisdiction; it is likewise upon this same question that the parties have directed their arguments as to jurisdiction. (Br. of Conf. Tribes, 32-35, and Br. of Montana, 19-23.) We do not wish to add to those arguments, but instead wish to direct the Court's attention to a somewhat different jurisdictional question, i.e., the question of whether the District Court was correct in assuming that 28 U.S.C. 1343(3) and 42 U.S.C.

1983 conferred jurisdiction as to the individual members, completely apart from any consideration of 28 U.S.C. 1341.

A ruling on this question is not required in order to reach either the merits of the appeals or the question of the applicability of 28 U.S.C. 1341. For 28 U.S.C. 1362 certainly confers jurisdiction as to the Tribes, and puts both the merits and the applicability of 28 U.S.C. 1341 in issue.

Thus, a ruling on this issue should await another case. This Court and the lower federal courts have consistently held that 42 U.S.C. 1983 and its jurisdictional counterpart, 28 U.S.C. 1343(3), do not encompass actions to challenge state taxes. See cases cited in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972) at 542, note 6.

After citing three cases decided with opinion by this Court and two recent affirmances, without opinion, this Court stated in note 6:

> "All of these cases involved constitutional challenges to the collection of state taxes. Congress has treated judicial interference with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly." (405 U.S. at 542.)

The Court then quoted the provisions of 28 U.S.C. 1341.

Is the Court suggesting by this reference that if 28 U.S.C. 1341 is not applicable to challenges to

state taxes by Indians, then the cases cited in note 6 are not applicable either?

This precise issue is presently pending before the Ninth Circuit in *Satiacum v. Kinnear*, No. 74-1121. This action is a civil rights action, brought under 42 U.S.C. 1983 by a Puyallup Indian for damages against state officials because they attempted to enforce the Washington cigarette tax against the plaintiff. The District Court dismissed, on the basis of failure to state a claim under the Civil Rights Act (42 U.S.C. 1983), but the Court of Appeals reversed. Although the issue was not discussed in the Court of Appeals decision (as yet unpublished), it was squarely presented by a petition for rehearing filed by the state officials. By order of October 23, 1975, the petition was held in abeyance pending a decision in the case at bar, apparently in view of the possibility it might decide the issue.

We submit that the issue is best decided either on review of the final decision of the Court of Appeals in *Satiacum* or in some other subsequent case. It has not been briefed in the case at bar—quite properly so—and its resolution is not necessary in order to reach the other important issues here presented.

DATED this 16th day of January, 1976.

Respectfully submitted,

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Supreme Court, U. S.
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BRIEF FOR THE QUINAULT INDIAN NATION AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES

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INDEX

	Page
TABLE OF AUTHORITIES	i
INTEREST OF AMICUS CURIAE	I
ARGUMENT	
I. Involvement of Indians with non-Indians is not a basis upon which a state may rely to assert jurisdiction over Indians acting within the boundaries of an established Indian reservation.	8
II. Mecalero and McClanahan provide a basis for the determination of jurisdiction issues on Indian reservations.	15
CERTIFICATE OF MAILING	23

TABLE OF AUTHORITIES

Cases — Page

Draper v. United States 164 U.S. 240 (1896).....18
Kake v. Egan, 369 U.S. 60 (1962).....19
Kennerly v. District Court of Montana, 400 U.S. 423 (1970).....14
Langford v. Monteith, 102 U.S. 145 (1880).....18
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).....15, 16
McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)....13, ...15, 16, 17, 20
New York ex rel Ray v. Martin 326 U.S. 496 (1964).....19
Surplus Trading Co. v. Cook, 281 U.S. 647 (1930).....19
United States v. McBratney, 104 U.S. 621 (1881).....18, 19
United States v. McGowan 302 U.S. 535 (1938).....19
Williams v. Lee, 358 U.S. 217 (1959)..5, ...19

TREATY

Treaty with the Quinault, 12 Stat. 971..1

UNITED STATES STATUTES

18 USC 1151.....13
18 USC 1152.....13
18 USC 1153.....13
18 USC 1154.....13
18 USC 1155.....13
18 USC 1156.....13
18 USC 1160.....13
18 USC 1163.....14

18 USC 1164.....14
18 USC 1165.....14
25 USC 231.....10
25 USC 1321.....10
25 USC 1322.....10
25 USC 1451.....21
P.L. 83-280, 67 Stat. 589.....14
P.L. 93-638, 13 USC and A.N. 1974, p. 7223, January 30, 1975.....21

OTHER AUTHORITIES

Taylor, Development Of Tripartite Jurisdiction In Indian Country, 22 Kansas Law Review 351 (1974).....21

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I.

INTEREST OF QUINAULT INDIAN NATION AS AMICUS CURIAE

Appellants and Appellees have consented to the filing of this brief. Written stipulations of consent have been filed with the Clerk of this Court.

The Quinault Indian Nation is a federally recognized Indian tribe of some 1,500 enrolled members, a majority of whom reside on the Quinault Indian Reservation in the State of Washington. The Business Committee of the Quinault Indian Nation is the governing body of the Nation and the Quinault Reservation pursuant to the Treaty with the Quinault, 12 Stat. 971, and the Bylaws and Constitution of the Quinault Indian Nation adopted in 1922, as Amended March 22, 1975.

The Quinault Indian Nation provides judicial, police, fire, ambulance, sanitation, utility, health, safety, zoning,

housing, fish and game management, forestry management, and other services to the population of the Reservation - Indian and non-Indian. Many of these services cannot be provided by county or state agencies because of lack of funds and manpower to provide such services. The Quinault Nation also provides social, medical, and legal aid services to its own members.

In order to provide these services the Quinault Nation must levy and collect taxes and other fees from members and non-members acting upon the Reservation. For example fisheries management, biological, and enforcement services are funded through the collection of taxes levied upon Indians and non-Indians who participate in the commercial and sport harvest of the abundant fish resources of the Reservation. The overwhelming

majority of this fish is sold to non-Indians. If the State of Washington is permitted to levy a tax on these sales, the Quinault Nation would be forced to do away with its own taxes. The small incomes of its members would not support a system of double taxation.

These tribal taxes are also important in bringing federal revenue sharing funds and grants and loans from the federal Law Enforcement Administration, Economic Development Agency, Department of Housing and Urban Development, and Department of Health, Education and Welfare, to the Reservation. Unlike tribal taxes, State taxes which have been levied for a half century on much of the timber removed from the Quinault Reservation; do not in substantial part return to the economy of the Reservation. Thus, the very existence of tribal governmental

functions on the Quinault Reservation is threatened by the taxing authority which the State of Montana and Amicus State of Washington seek throught this litigation.

Further, the economy of the Quinault Indian people is threatened by the scheme of state taxation within the boundaries of the Reservation sought by Montana and approved in part by the Court below. The organization and existence of tribal and individual Indian enterprise on the Reservation is affected by the imposition of state tax laws. The burden of accounting and bookkeeping expenses necessary for the collection of such taxes falls directly on the Indian business.

It is incorrect to argue that Indian enterprises operating on a reservation may limit their sales to Indians. (See Opinion of Court below. 392 F. Supp., at 1308) The result of

such a limitation on the Quinault Reservation and most others, would be the destruction of Indian enterprise and a violation of the federal policy calculated to make all Indians full-fledged participants in American society. Williams v. Lee, 358 U.S. 217, at 220. While only a quarter of the population of the Reservation is non-Indian, most of the goods produced or sold on the Reservation are sold to non-Indians. The Reservation population of just over 1,000 Indian persons is too small and economically depressed a market to provide for significant Indian to Indian sales. The fish packing plant, individual and tribal cedar roofing mills, and arts and crafts shops could not survive such a limitation.

Assuming they did survive the imposition of state taxes, their goals and structure would have to be substantially

changed. The tribal business enterprises are organized not to maximize income to the tribe, but to utilize the human and material resources of the Reservation for the benefit of the Indian people. Thus, there is less emphasis placed on the ability of the enterprise to earn large surpluses and greater emphasis placed on employment, training, and advancement of tribal members; the wise use of the material resources of the Reservation; respect for the cultural values of Indian employees; and keeping wealth generated by the enterprises within the Reservation economy. The realization of these goals is partially dependent on the fact that tribal enterprises are totally within the tribal jurisdiction and they and their customers do not bear the costs of being taxed or regulated by agencies of the State.

It is questionable whether the Indian enterprises of the Quinault Nation could continue to play these beneficial roles within the tribal community were they or their customers taxed by the State. It is also questionable whether they could succeed at all on the Reservation. Tribal enterprises organized along the lines of non-Indian businesses have generally been unable to compete with non-Indian businesses.

In sum, it is the position of the Quinault Nation that the scheme of taxation sought by the states in this litigation will have a great detrimental effect upon the Quinault Indian people, economy and government. If approved, this tax scheme will deprive the tribal government of needed revenue, and the tribal enterprise management committees of their flexibility to design tribal enterprises

to meet Indian needs. In these major respects this tax scheme infringes on the right of reservation Indian people to govern themselves.

ARGUMENT

I.

INVOLVEMENT OF INDIANS WITH NON-INDIANS IS NOT A BASIS UPON WHICH A STATE MAY RELY TO ASSERT JURISDICTION OVER INDIANS ACTING WITHIN THE BOUNDARIES OF AN ESTABLISHED INDIAN RESERVATION

In concluding that Montana may require an Indian retailer to collect Montana taxes from non-Indians for purchases made on the reservation, the Court below argues only that it is the involvement of the Indian retailer with non-Indians that gives Montana the authority to compel collection. The Court below does not cite one instance where this concept of reservation Indian involvement with non-Indians on the reservation

has ever been the criterion for a judicial or congressional grant of jurisdiction over an Indian to the states. 392 F. Supp., at 1311.

The question to be answered in this litigation has little to do with the tax power of states. The issue is whether a state has the requisite jurisdiction within the boundaries of an established Indian reservation to force an Indian to act in compliance with its laws. The State of Montana seeks to compel, by civil and criminal punishment, a reservation Indian to do the act of collecting its taxes. It will be assumed, although not conceeded, that a state may require its non-Indian citizens to pay state taxes on goods purchased on Indian lands within the boundaries of an established Indian reservation. This state interest in revenue does not, however, extend to

the right to compel the retail merchants of a foreign state or jurisdiction to collect taxes from the resident citizens of the state. The question is one of state jurisdiction to force the act of collection, rather than one of taxing power.

The fallacy in the analysis of the Court below may be more readily seen if an example having nothing to do with taxation is used. Suppose a state has no public health jurisdiction[1] over Indians within the boundaries of an established Indian reservation. The state adopts a public health statute which makes the act of smoking while inside a restaurant a misdemeanor. The statute conclusively presumes that it is enacted for the protection of the health of restaurant

1) 25 U.S.C. §231, §1321, and §1322 have not been complied with in the public health area.

patrons. The statute also subjects restaurant proprietors to a misdemeanor penalty and to closure of the restaurant if they do not take certain steps to inform patrons of the no smoking law and actively prevent patrons from smoking while inside the restaurant by denial of service and eviction.

Assume that an Indian restaurant owner of a reservation within this state establishes a restaurant on tribal land within the boundaries of that reservation, but in an area where the restaurant is frequented by a large number of non-Indians. The tribe has no statute prohibiting smoking in restaurants. May the state by the use of its public health law and its interest in protecting the health of its non-Indian citizens force the Indian proprietor, by the threat of closure and criminal charges;

to take action against persons who smoke in his restaurant? The question, of course, is a matter of jurisdiction. While the state may have a legitimate interest in the protection of the health of its citizens, its right to implement that interest is limited by its jurisdiction.

How close does the involvement of Indian with non-Indian on the reservation as described by the Court below have to be before state jurisdiction arises. A sale, a marriage, a partnership, a written correspondence, a contract, a telephone conversation, a purchase? Would residence within an area where the majority of neighbors are non-Indians suffice for certain purposes?

It is the belief of the Quinault Nation that this Court spoke directly to this issue in McClanahan v. Arizona

State Tax Commission, 411 U.S. 164, (1973), when it declared that the admitted absence of state jurisdiction over the Indian people of the Navajo reservation would seem to dispose of the issues in McClanahan. 411 U.S., at 179. Because the Court below relied on the theory of Indian involvement with non-Indians as a basis for state jurisdiction it is given some consideration below.

In the area of criminal jurisdiction the activies of Indians either as perpetrators of crimes against non-Indians within the boundaries of reservations are subject to tribal and federal jurisdiction only, absent a governing act of Congress. The non-Indian perpetrator of a crime against an Indian or Indian property within a reservation subjects himself to federal jurisdiction. 18 U.S.C. §1151, §1152, §1153, §1154, §1155, §1156, §1160,

§1163, §1164, §1165.

Civil jurisdiction over Indians involved in commercial dealings with non-Indians within the reservation has been held to be in the tribe where the state has not complied with a governing act of Congress. Kennerly v. District Court of Montana, 400 U.S. 423 (1970), at 426. Here the Court below indicates that in terms of civil jurisdiction, the same governing act of Congress which prevented the State of Montana from exercising civil jurisdiction over an Indian in Kennerly, P.L. 83-280, 67 Stat. 589, 28 U.S.C. 1360 (a), has not been complied with. 392 F. Supp., at 1306. The Moe court finds the Montana revenue collection statutes are civil in nature. It is difficult to understand how that Court distinguishes its holding from the holding of Kennerly.

II.

MESCALERO AND MCCLANAHAN PROVIDE A BASIS FOR THE DETERMINATION OF JURISDICTIONAL ISSUES ON INDIAN RESERVATIONS

The brief of the Attorney General of the State of Washington attempts to contrast Mescalero Apache Tribe v. Jones 411 U.S. 145 (1973) with McClanahan and argues that they cannot be reconciled because Mescalero holds that in order to obtain "immunity" from state taxation an Indian person or tribe must point to a specific exemption and McClanahan holds that in order for a state to tax an Indian or Indian income the state must show some expres federal legislation giving it the jurisdiction to levy and collect such a tax.

In fact the two holdings are easily reconciled. Mescalero announces the rule when the Indian, his income, or his property is located outside the

reservation, and McClanahan announces the rule when the Indian, his income, or his property is located within the boundaries of an established Indian reservation. The Mescalero court says just exactly that. 411 U.S., at 148.

Thus, in both Mescalero and McClanahan the questions of whether taxes can be collected were considered by this Court in terms of jurisdiction. In Mescalero this Court was careful to point out, 411 U.S. at 148-149, that tribal activities carried on outside the reservation boundaries are generally subject to the nondiscriminatory laws of the state. Such activities are subject to state jurisdiction. In Mescalero the Court went on to find, consistently, that for some of the activities carried on by the Mescalero Apache Tribe no specific immunity from state taxes existed, and

for some activities federal statutes prohibited taxation.

In McClanahan this Court pointed out...

> "Indeed a startling aspect of this case is that appellee (state) apparently conceeds that in the absence of compliance with 25 U.S.C. 1322(á) the Arizona Courts can exercise neither civil or criminal jurisdiction over reservation Indians... But the appellee nowhere explains how, without such jurisdiction, the State's tax may be either imposed or collected... Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, cf. Ward v. Board of County Commissioners, 253 U.S. 17 (1920), the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case." 411 U.S., at 178.

Thus, a conceptual framework for the determination of state power is established in terms of jurisdiction. Outside the reservation, where the state generally exercises jurisdiction, the state will be presumed to have taxing authority-absent

a federal prohibition. Within the reservation boundaries, where the Tribal and Federal governments generally exercise jurisdiction, the state may not tax or compel any other acts by Indians without clear authorization.

The Amicus State of Washington argues that states do exercise jurisdiction within the reservations. The cases cited for this proposition, however, are all readily distinguishable from the issue at hand. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896); Langford v. Monteith, 102 U.S. 145 (1880); were all cases which involved actions against a non-Indian by another non-Indian. In these cases this Court found that no federal[2] interest was

2) This Court has never decided, however, whether tribal jurisdiction might be asserted when the actions of a non-Indian against another non-Indian threaten the peace and safety of the reservation community.

involved and permitted state court to exercise jurisdiction. New York ex rel. Ray v. Martin, 326 U.S. 496 (1946) simply followed the rule in McBratney, supra; and there was a question, admittedly unanswered, as to whether the Seneca Reservation was a state or federal reservation. Kake v. Egan, 369 U.S. 60 (1962); Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); and United States v. McGowan, 302 U.S. 535 (1938) were all cases in which no established Indian reservation was involved. In McGowan federal jurisdiction attached even though a crime was committed by a white man outside an established Indian reservation because of a federal interest in the charge of selling intoxicants to Indians. This Court in Williams v. Lee, 358 U.S. 217 (1958) found, consistent with the above analysis, that a state court action to collect a debt could not be

brought against an Indian by a white Indian trader located within a reservation because no federal statute had given the state any jurisdiction over such controversies. 358 U.S., at 222.

Finally, the residual jurisdiction argument at the State of Washington has been rejected by this Court in McClanahan. 411 U.S., at 177. By considering questions regarding the right of a state to compel or affect Indians acting within the boundaries of established reservations in terms of jurisdiction, this Court has done away with the concept Indian "immunity". The Indian acting within the boundaries of an established reservation is not seen as "immune" from state jurisdiction, but simply subject to another jurisdiction - that of the tribe or the federal government.[3]

3) For a discussion of the "Equal (cont.)

The Congress of the United States has recently declared again its strong support for the exercise of tribal jurisdiction within the reservation. The preamble of the Indian Self Determination and Education Act P.L. 93-638, 13 U.S.C. and A.N. 1974, p. 7223, January 30, 1975; (See also: 25 U.S.C. §1451) indicates that Congress is intent upon turning over the great majority of federal functions to the tribal governments themselves. To allow the states to force reservation Indians to comply with state laws simply because the Indian continues to have business or other kinds of relationships with non-Indians would surely undermine this policy.

For these reasons the Quinault

Footing Doctrine" as raised by the State of Washington, see: Taylor, Development of Tripartite Jurisdiction in Indian Country, 22 Kansas Law Revies 351 (1974).

Indian Nation respectfully urges this Court to uphold the position of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

Dated the 20th day of December, 1975

Respectfully submitted,
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CERTIFICATE OF MAILING

I, MICHAEL TAYLOR, the attorney for Amicus Curiae Quinault Indian Nation certify that on the 19 day of December, 1975, I served three copies of the foregoing BRIEF FOR THE QUINAULT INDIAN NATION on each of the counsel for Appellants and Appellees herein by mailing true copies thereof, first class airmail postage prepaid as follows:

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